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UNRAVELLING THE CONFUSED RELATIONSHIP BETWEEN TREATY OBLIGATIONS TO EXTRADITE OR PROSECUTE AND “UNIVERSAL JURISDICTION” IN THE LIGHT OF THE HABRÉ CASE

By Matthew Garrod*

The *Habré* case marks the second contentious case in which the International Court of Justice (“ICJ”) has had the opportunity to clarify universal criminal jurisdiction in international law.¹ On the first occasion, in the *Arrest Warrant* case, the ICJ declined the opportunity to discuss the legality of universal jurisdiction.² In *Habré*, the ICJ decided on the obligation to extradite or prosecute for the first time and referred to the prescriptive jurisdiction arising out of this obligation in Article 5(2) of the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) as “universal jurisdiction.”³

This article uses a wide range of primary sources to bring new insight and much needed conceptual and legal clarification on the meaning of “universal jurisdiction” and its relationship between jurisdiction in treaty obligations to extradite or prosecute. In turn, it aims to inform the work on universal jurisdiction at the UN General Assembly and its Sixth Committee and assist states and courts in the implementation of their treaty obligations to extradite or prosecute, thereby preventing disputes.⁴ Its central argument is that treaty obligations to extradite or

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¹ Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. REP. 32 (Jul. 20) (“Judgment” or “*Habré* case”).

² Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. REP. 3 (Feb. 14) (“Arrest Warrant”). The ICJ determined this case by “assuming” that Belgium had jurisdiction under international law to issue and circulate an arrest warrant in respect of the then Minister of Foreign Affairs of the DRC, thereby deciding to focus solely on the question of immunities under international law. This was on the basis that the DRC in its final submissions had dropped its challenge to the legality of Belgium’s claim to exercise universal jurisdiction and relied exclusively on the alleged violation of diplomatic immunity, *id.*, para. 46. The ICJ’s decision in this regard was criticized in the Joint Separate Opinion of Judges Higgins *et al.*, who were of the opinion that “it was not only desirable, but indeed necessary, that the Court should have stated its position on this issue of jurisdiction”, *id.*, para. 3. See further Part V, notes 295-97.

³ Dec. 10, 1984, 1465 UNTS 85; Judgment, *supra* note 1, paras. 74-75, 84, 91, 118.

⁴ The Sixth Committee is the primary UN forum for the consideration of legal questions in the General Assembly.

prosecute should not be conceptualized as, or used to infer the existence of, universal jurisdiction.⁵ Rather, the type of jurisdiction arising out of these obligations, it is proposed, is more accurately termed “treaty-based jurisdiction,” which is antithetical to universal jurisdiction and at variance with its underlying rationale.⁶

In making this argument, this article provides three main sources of insight. First, it argues that the references to “universal jurisdiction” in the *Habré* case amount to little more than *obiter dictum* and do not support universal jurisdiction’s existence in customary international law or its relationship, if any at all, to treaty obligations to extradite or prosecute. Second, it analyzes the text of Articles 5 and 7 of the CAT and their *travaux préparatoires*, both of which are bypassed by the ICJ, to show that jurisdiction in treaty obligations to extradite or prosecute is incapable of giving rise to universal jurisdiction. Lastly, it presents the findings of an original empirical analysis of state practice since the end of World War II to the present, including actual prosecutions purporting to be based on universal jurisdiction, to show that universal jurisdiction does not exist under customary international law at present and that common examples of universal jurisdiction state practice are actually different types of treaty-based jurisdiction.

The argument advanced in this article finds support in emerging scholarship⁷ and has been adopted in a study on universal jurisdiction recently published by the European Parliament,

⁵ This article analyzes universal jurisdiction only in criminal cases. It not intended to challenge the extent to which universal jurisdiction exists and over what crimes in current customary international law. Nor is it concerned with proposing a definition of universal jurisdiction.

⁶ The term “treaty-based jurisdiction” is borrowed from Arrest Warrant, *supra* note 2, para. 41 (Higgins et al., JJ., joint sep. op.); U.S. v. Yousef, 327 F.3d 56 (2d Cir. 2003); Special Rapporteur, Second report on crimes against humanity, para. 113, UN Doc. A/CN.4/690 (2016).

⁷ Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes*, 230 RECUEIL DES COURS 9, 98-99 (1991 V); Luc Reydam, *The Rise and Fall of Universal Jurisdiction*, 14-26 (2010), at www.ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp31-40/wp37.pdf; Sienho Yee, *Universal Jurisdiction: Concept, Logic, and Reality*, 10 CHINESE JIL 504 (2011).

following the submission of evidence by the present author.⁸ It also builds on the present author's previously published research on universal jurisdiction's alleged historical legal sources⁹ and current role as an independent expert legal advisor at the UN on counter terrorism law, including treaty obligations to extradite or prosecute.

Clarification of the relationship between treaty obligations to extradite or prosecute and universal jurisdiction, especially in the light of the *Habré* case, is timely and important for the following reasons. First, since the 1980s there has emerged an (unproven) prevailing narrative in scholarship, research institutes, nongovernmental organizations ("NGOs"), and the International Committee of the Red Cross ("ICRC") that treaty obligations to extradite or prosecute impliedly embody and even mandate universal jurisdiction.¹⁰ This argument is gaining ground following the *Habré* case. For example, leading scholars increasingly discuss this case as if the ICJ were affirming the existence of universal jurisdiction and providing meaningful guidance on its relationship with the obligation to extradite or prosecute.¹¹ Perhaps more important, in 2014 the International Law Commission ("ILC") adopted a "Final Report" on treaty obligations to

⁸ Luc Reydam, *The application of universal jurisdiction in the fight against impunity*, European Parliament, 10-13 (Mar. 14, 2016), at [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/578000/EXPO_IDA\(2016\)578000_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/578000/EXPO_IDA(2016)578000_EN.pdf). The present author submitted oral and written evidence to this study during interviews (on file with author). The study was requested by the Parliament of the European Union in order to "feed" in to the debate on universal jurisdiction at the UN General Assembly and help it form opinion and make decisions in this respect.

⁹ Matthew Garrod, *The Development of Protective Principle Jurisdiction over War Crimes and the Hollow Concept of Universality*, 12 INT'L CRIM. L. REV. 763 (2012); Matthew Garrod, *Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law*, 25 DIPLOMACY & STATECRAFT 195 (2014); Matthew Garrod, *The British Influence on the Development of the Laws of War and the Punishment of War Criminals: From the Grotius Society to the United Nations War Crimes Commission*, in BRITISH INFLUENCES ON INTERNATIONAL LAW, 1915-2015 (Robert McCorquodale & Jean-Pierre Gauci eds., 2016).

¹⁰ For the starting point of this increasingly intensive scholarly debate on the matter, see Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988). See further Part I, notes 50-55.

¹¹ See, e.g., Mads Andenas & Thomas Weatherall, *International Court of Justice: Questions Relating to the Obligations to Extradite or Prosecute (Belgium v Senegal) Judgment of 20 July 2012*, 62 INT'L & COMP. L.Q. 753 (2013); Máximo Langer, *Universal Jurisdiction is Not Disappearing. The Shift from 'Global Enforcer' to 'No Safe Haven' Universal Jurisdiction*, 13 J. INT'L CRIM. JUST. 245, 251 (2015); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES JURISDICTION, Tentative Draft No. 2, §217, cmt. c & Reporters' Note 2 (2016).

extradite or prosecute stating, in reliance on the judgment in the *Habré* case, that the “necessary jurisdiction,” in the implementation of such obligations, “would necessarily reflect an exercise of universal jurisdiction.”¹²

Second, the topic of universal jurisdiction was elevated to the UN General Assembly and its Sixth Committee in 2009, at the request of the African Union (“AU”), following a conflict concerning the AU accusing certain European states of abusing this jurisdiction by selectively targeting leaders from the continent for politically motivated prosecutions.¹³ The conflict generated between Africa and Europe over universal jurisdiction is more widespread than regional differences and is ongoing. Work on this topic has made little progress during the past seven years and delegations are presently unable to agree on how to move the topic forward.¹⁴ The primary reason for this impasse is due to considerable confusion between universal jurisdiction and treaty obligations to extradite or prosecute. On one hand, several delegations evidence universal jurisdiction’s existence by referring to extradite or prosecute obligations.¹⁵ As extradite or prosecute obligations are contained in more than sixty treaties, including numerous treaties and legally binding UN Security Council resolutions relating to acts of “terrorism,”¹⁶ the

¹² Report of the ILC on the Work of Its Sixty-Sixth Session, UN GAOR, 69th Sess., Supp. No. 10, paras. 145, 147, UN Doc A/69/10 (2014). The ILC was established by the UN General Assembly in 1947 to promote the progressive development of international law and its codification. *See* Statute of the International Law Commission 1947, annexed to A/RES/174 (II) (Nov. 21, 1947) (as amended).

¹³ *See* Assembly of the AU, Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/Dec.199 (XI) (Jul. 1, 2008); Letter Dated 21 January 2009 from the Permanent Representative of Tanzania to the UN addressed to the Secretary-General, UN Doc. A/63/237 (Feb. 3, 2009); Letter Dated 29 June 2009 from the Permanent Representative of Tanzania to the UN addressed to the UN secretary-general, UN Doc. A/63/237/Rev.1 (Jul. 23, 2009).

¹⁴ Press Release, Speakers in Sixth Committee Agree on Need to Advance Discussion of Universal Jurisdiction, While Differing over Principle’s Application, Scope, Sixth Committee, 71st Sess., 14th Mtg. (13 Oct. 2016), at <https://www.un.org/press/en/2016/gal3525.doc.htm>.

¹⁵ *E.g.*, UN secretary-general report, The Scope and Application of the Principle of Universal Jurisdiction, paras. 14, 18, 22, 36, 38-39, UN Doc. A/67/116 (2012) (“secretary-general report (2012)”; UN secretary-general report, The Scope and Application of the Principle of Universal Jurisdiction, paras. 11, 16, 21-22, 31, 37, 64, 74-75, UN Doc. A/70/125 (2015) (“secretary-general report (2015)”).

¹⁶ There is currently no internationally agreed or comprehensive definition of “terrorism,” which has been the subject of negotiations at the UN since 2000 and is available online at <http://legal.un.org/committees/terrorism/> (visited June. 22, 2017). Nonetheless, the extradite or prosecute obligation is contained in numerous international

Habré case is leading to further positive statements about universal jurisdiction's application over a potentially voluminous list of crimes.¹⁷ On the other, a considerable number of delegations caution that extradite or prosecute obligations, despite having the purpose of preventing impunity, is conceptually and legally distinct from universal jurisdiction proper.¹⁸ As a result, a Working Group, established by the Sixth Committee to undertake a "thorough discussion" of universal jurisdiction, has identified a non-exhaustive list of twelve crimes, not all of which are crimes under international law, in acknowledging support among some delegations for "treaty-based forms of universal jurisdiction."¹⁹

The article concludes that universal jurisdiction is, at present, a hollow concept without state practice, which is in urgent need of substantial revision and more accurate definition. This requires recognition that treaty obligations to extradite or prosecute do not provide a legal source of "universal jurisdiction" and that characterizing these obligations as such is conceptually confused and inconsistent with actual state practice. Unilateral assertions of universal jurisdiction should be avoided until the basic concept is clarified and its existence in custom is established by states. The risk is that excessive—and unlawful—claims of jurisdiction (including over nationals

and regional counter terrorism instruments and Security Council resolutions; e.g., International Convention for the Suppression of Terrorist Bombings, Dec. 15, 1997, 2149 UNTS 256, Art. 6 ("Terrorist Bombings Convention"); S/RES/1373 (2001), para. 2(e) (Sep. 28, 2001).

¹⁷ E.g., UN GAOR, 69th Sess., 12th mtg., para. 21 (Belarus), UN Doc. A/C.6/69/SR.12 (Oct. 15, 2014); UN GAOR, 70th Sess., 12th mtg., paras. 57 (Switzerland), 78 (Poland), UN Doc. A/C.6/70/SR.12 (Oct. 20, 2015). See also the following report, prepared for the purpose of informing Sixth Committee discussions: Amnesty International, *Universal Jurisdiction: Strengthening this Essential Tool of International Justice* 25, AI Index IOR 53/020/2012, Oct. 2012. For a contrary view of the *Habré* case, see Statement by Permanent Mission of India to the UN, The Scope and Application of the Principle of Universal Jurisdiction (Oct. 15, 2014), at <http://statements.unmeetings.org/media2/4653143/india-en.pdf>.

¹⁸ E.g., UN secretary-general report, The Scope and Application of the Principle of Universal Jurisdiction, para. 15, UN Doc. A/65/181 (2010) ("secretary-general report (2010)"); secretary-general report (2012), *supra* note 15, para. 41.

¹⁹ These crimes are apartheid, corruption, crimes against humanity, crime of aggression, enforced disappearances, genocide, piracy, slavery, terrorism, torture, transnational organized crime and war crimes. See Working Group Chair Informal Working Paper (Nov. 7, 2014), at <https://papersmart.unmeetings.org/media2/4655216/roadmap-en.pdf>; UN GAOR, 71st Sess., 31st mtg., para. 26 (Working Group Chair), UN Doc. A/C.6/71/SR.31 (Dec. 2, 2016).

of non-state parties to the relevant treaties), breaching other rules of international law and causing further tension and disputes, could result.

I. THE CONCEPT AND INTERPRETATION OF UNIVERSAL JURISDICTION PRE- HABRÉ

A. *Extraterritorial Criminal Jurisdiction and the Burden of Proof*

It is useful at the outset of the analysis to explain the meaning of universal jurisdiction, as it is commonly understood in scholarship and the work of research institutes and NGOs, in order to distinguish it from the obligation to extradite or prosecute. Generally, states are prohibited from legislating on criminal matters outside their territory unless international law provides for an explicit permission.²⁰ Of decisive importance is the burden of proof.²¹ The state that asserts the applicability of its domestic law beyond its territory bears the burden of proving that it is permitted by one of the grounds of prescriptive jurisdiction accepted under customary international law.²² There is presently no multi-lateral treaty codifying and defining these grounds of prescriptive jurisdiction, although since the early twentieth century they have been defined *lex ferenda* in scholarship and the work of research institutes, such as the American Law Institute, as including principles of territoriality, nationality, and protective jurisdiction.²³ Such proof of a link with the prescribing state serves to prevent unlawful interference in the

²⁰ S.S. “Lotus” (Fra. v. Turk.), 1927 PCIJ (Ser. A) No. 10 (Sep. 7); Arrest Warrant, *supra* note 2, para. 4 (Guillaume, J., sep. op.); Report of the ILC on the Work of Its Fifty-Eighth Session, UN GAOR, 58th Sess., Supp. No. 10, annex E, paras. 8-9, UN Doc. A/61/10 (2006); RESTATEMENT (FOURTH), *supra* note 11, §211.

²¹ The link relied on to ground prescriptive jurisdiction over given conduct must exist at the time at which the conduct is performed.

²² It is axiomatic that jurisdiction may also be established by treaty.

²³ Research in International Law Under the Auspices of the Faculty of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AJIL (SUPP) 437 (1935). For a fuller consideration of internationally acceptable grounds of prescriptive criminal jurisdiction, see UN Doc. A/61/10, *supra* note 20, paras. 10-21; Frederick A. Mann, *The Doctrine of Jurisdiction in International Law*, 111 R.C.A.D.I. 1 (1964); International Bar Association Legal Practice Division, *Report of the Task Force on Extraterritorial Jurisdiction*, 141-161 (Sep. 28, 2008), at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx; RESTATEMENT (FOURTH), *supra* note 11, §§212-17.

sovereignty and domestic affairs of other states.²⁴ This may be contrasted with the principle of universal jurisdiction, the most controversial ground of jurisdiction, which does not require the prescribing state to prove any link to its territory, nationals or national interests when exercised.

B. Definition the Universal Jurisdiction Concept

There is currently no agreed definition of universal jurisdiction among states. However, scholars, research institutes and several states usually define universal jurisdiction as the “absence” of normal jurisdictional links to the prescribing state.²⁵ For example, the Institute of International Law in its resolution on universal jurisdiction provides that:

Universal jurisdiction in criminal matters, as an additional ground of jurisdiction, means the competence of a State to prosecute alleged offenders and to punish them if convicted, irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law.²⁶

The absence of proof of a prescriptive link is justified by universal jurisdiction’s underlying rationale, which transcends the interests of states. First, the grave or heinous nature of certain crimes under international law, such as piracy and war crimes, is widely believed to be at universal jurisdiction’s “core.”²⁷ Second, because such crimes are so serious, preventing the impunity of them is a concern of every state. As such, states acting on the basis of universal

²⁴ Christian Tomuschat (Rapporteur), *Universal Criminal Jurisdiction With Respect to the Crime of Genocide, Crimes Against Humanity and War Crimes*, 71(I) YEARBOOK OF INSTITUTE OF INTERNATIONAL LAW 213, 219-20 (2005).

²⁵ E.g., secretary-general report (2010), *supra* note 18, at 5, Council of the European Union, AU-EU Technical ad hoc Expert Group, Report on the Principle of Universal Jurisdiction, para. 8, Doc. 8672/1/09 REV1 (2009) (“AU-EU report”); Roger O’Keefe, *Universal Jurisdiction. Clarifying the Basic Concept*, 2 J. INT’L CRIM. JUST. 735, 740, 745 (2004); The Princeton Principles on Universal Jurisdiction 23, 43 (Stephen Macedo ed., 2001), at www.lapa.princeton.edu/hosteddocs/unive_jur.pdf; Yee, *supra* note 7, para. 3.

²⁶ Institute of International Law, Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, War Crimes, and Crimes Against Humanity, para. 1 (2005), at http://www.idi-ijl.org/idiF/resolutionsF/2005_kra_03_fr.pdf (“IIL”). See also RESTATEMENT (FOURTH), *supra* note 11, §217.

²⁷ UN GAOR, 69th Sess., 28th mtg., para. 31 (Working Group Chair), Working Group Chair Informal Working Paper, *supra* note 19. See also Higgins, *supra* note 7, at 90; Princeton Principles, *supra* note 25, at 23, 28; Randall, *supra* note 10, at 788; Tomuschat, *supra* note 24, at 225.

jurisdiction do so as “agents of the international community” to protect exclusively international community values.²⁸ The types of values that may be protected by universal jurisdiction are usually left insufficiently explained or unsubstantiated by courts and in scholarship and need to be worked out and agreed upon by states. They are often proposed to include the prevention of impunity of heinous crimes and the protection of human rights. The Sixth Committee has so far been unable to reach agreement on both the definition of universal jurisdiction and its underlying rationale, including the international community values protected, during its work on universal jurisdiction.²⁹

C. Treaty-Based Jurisdiction

If the unique feature of universal jurisdiction is the absence of any link at all between the crime and the prescribing state, then jurisdiction arising out of treaty obligations to extradite or prosecute is its antithesis. Since 1929 the extradite or prosecute obligation has been included in more than sixty treaties with some complex and varying conditions of extradition or prosecution.³⁰ Although treaty-based jurisdiction arises out of all treaties creating extradite or prosecute obligations, the main focus of this article is on a particular kind of extradite or prosecute provision known as the “Hague formula” and the extradite or prosecute obligation formulation contained in the grave breaches provisions of the 1949 Geneva Conventions.³¹ The basis for this focus is that the Hague formula was first included in the 1970 Convention for the

²⁸ Arrest Warrant, *supra* note 2, paras. 5, 46 (van den Wyngaert, J., diss. op.), 15 (Guillaume, J., sep. op.), 51, 61, 73, 75 (Higgins et al., JJ., joint sep. op.); Attorney-General for Israel v. Eichmann (S. Ct., May 29, 1962), 36 ILR 277, 300; Demjanjuk v. Petrovsky, 776 F.2d 571, 582-83 (6th Cir. 1985); National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre (485/2012) [2013] ZASCA 168, para. 39 (Nov. 27, 2013); secretary-general report (2010), *supra* note 18, para. 10.

²⁹ UN Doc. A/C.6/71/SR.31, *supra* note 19.

³⁰ For a description of a proposed typology of provisions containing extradite or prosecute obligations in treaties, *see* Secretariat, Survey of multilateral conventions which may be of relevance for the work of the ILC on the topic “The obligation to extradite or prosecute (*aut dedere aut judicare*),” para. 91, UN Doc. A/CN.4/630 (2010) (“secretariat survey”).

³¹ *Id.*, para. 90.

Suppression of Unlawful Seizure of Aircraft³² and is “unanimously acknowledged” as having served as a model for most of the contemporary criminal law conventions.³³ As such, this provision has been used in numerous international and regional treaties aimed at the suppression of specific offenses, principally in the field of countering terrorism,³⁴ but also in many other diverse areas, including torture,³⁵ mercenaries,³⁶ safety of UN personnel,³⁷ transnational organized crime,³⁸ corruption³⁹ and forced disappearances.⁴⁰ The 1949 Geneva Conventions are claimed by leading scholars as the “first treaty-based embodiment” of mandatory universal jurisdiction and influenced the subsequent adoption of universal jurisdiction in criminal law conventions (including conventions containing the Hague formula) since the 1970s.⁴¹

A treaty-based obligation to extradite or prosecute requires a state party to establish its jurisdiction over a relevant offense—for example, torture, in the case of the CAT—when an alleged offender is present in the state’s territory (“Custodial State”) and either prosecute him or extradite him to a party with a link to the offense.⁴² The common wording used in treaties that use the Hague formula, including in the text of the CAT, describes the treaty-based jurisdiction of a Custodial State in the following terms: each contracting state “shall . . . take such measures as may be necessary to establish its jurisdiction over the offense in the case where the alleged

³² Dec. 16, 1970, 860 UNTS 105 (“Seizure of Aircraft Convention”).

³³ Secretariat survey, *supra* note 30, paras. 90-91, 113. For a list of treaties containing the Hague formula, see *id.*, para. 108.

³⁴ *E.g.*, International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 UNTS 197 (“Financing Convention”).

³⁵ *Supra* note 3.

³⁶ International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Dec. 4, 1989, 2163 UNTS 75.

³⁷ Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 2051 UNTS 363.

³⁸ Convention against Transnational Organized Crime, Nov. 15, 2000, 2225 UNTS 209.

³⁹ Convention against Corruption, Oct. 31, 2003, 2349 UNTS 41.

⁴⁰ International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716, UNTS 3.

⁴¹ Roger O’Keefe, *The Grave Breaches Regime and Universal Jurisdiction*, 7 J. INT’L CRIM. JUST. 811, 811, 825-26 (2009).

⁴² *Supra* note 3, Art. 5(2).

offender is present in its territory and it does not extradite him . . . to any of the States mentioned in paragraph 1”.⁴³

The states “mentioned in Paragraph 1” (“Paragraph 1 States”) have important links with a relevant offense. These links are often specified in provisions used in parallel to extradite or prosecute obligations, in particular where a state party’s nationals or national vital interests are implicated by an offense.⁴⁴ For example, the Terrorist Bombings Convention permits states parties to establish their jurisdiction over a relevant offense when committed against the state’s nationals, the state’s property abroad (including an embassy or other diplomatic or consular premises), aircraft operated by the government, or if an offense is committed in an attempt to compel the state to do or abstain from doing any act (thereby threatening the state’s sovereignty, independence and governmental functions).⁴⁵ Therefore, jurisdiction derived from treaty obligations to extradite or prosecute has a treaty basis in international law and accordingly creates important links with one or more of the parties to the relevant treaty regime.

D. Universal Jurisdiction’s False Historical Foundations and Hollow Concept

The most important reason for clearly distinguishing between universal jurisdiction and jurisdiction arising out of treaty obligations to extradite or prosecute is because the former is based on false historical foundations and is a hollow concept. This article is not the place to examine universal jurisdiction’s historical origins, which has been examined in-depth by the present author elsewhere.⁴⁶ It suffices to say that, contrary to common belief, there is no historical evidence to support the existence of a customary rule of universal jurisdiction over

⁴³ *Id.*

⁴⁴ The state’s national vital interests include sovereignty, political independence, security, diplomatic personnel and premises, embassies, and government facilities abroad. *See further* Part V, notes 285-92.

⁴⁵ Terrorist Bombings Convention, *supra* note 16, Art. 6.

⁴⁶ Garrod (2012), *supra* note 9; Garrod (2014), *supra* note 9.

piracy and war crimes. Consequently, universal jurisdiction has no historical foundations in customary international law and is a hollow concept.⁴⁷ This finding has important implications for the extent of the existence of universal jurisdiction in customary international law as it stands today. Indeed, a detailed empirical analysis of state practice from the end of World War II to the present confirms that universal jurisdiction remains a concept without state practice.⁴⁸ Recent scholarship and case law also shows that the heinous nature of piracy has nothing to do with universal jurisdiction and is therefore incapable of providing a rationale for it; and by extension, it does not provide a valid precedent for universal jurisdiction over crimes other than piracy.⁴⁹ The uncertain and controversial status of universal jurisdiction in customary international law would suggest that a cautious approach is needed when reading treaty obligations to extradite or prosecute as either permitting or mandating universal jurisdiction.

1. *Unproven Prevailing Narrative*

However, since the 1980s there has developed an (unproven) prevailing narrative in scholarship that universal jurisdiction has “long and honorable” historical roots under customary international law in respect of piracy and war crimes, which can be analogized with jurisdiction contained in modern treaty obligations to extradite or prosecute.⁵⁰ The basis for this analogy is

⁴⁷ *Id.* For what it is worth, this finding has been adopted by the study on universal jurisdiction published by the European Parliament; see Reydam, *supra* note 8, at 7-8. On the issue of piracy, see Harry Gould, Cicero’s Ghost. Rethinking the Social Construction of Piracy, in *MARITIME PIRACY AND THE CONSTRUCTION OF GLOBAL GOVERNANCE* (Michael J. Struett, Jon D. Carlson & Mark T. Nance eds., 2013); Tamsin Paige, *Piracy and Universal Jurisdiction*, 12 *MACQUARIE LJ* 131 (2013); Reydam, *supra* note 7, at 10-13; Alfred P. Rubin, *The Law of Piracy* (1998).

⁴⁸ Part IV, notes 258-83.

⁴⁹ *U.S. v. Hasan*, 747 F.Supp.2d 599, 611 (E.D. Va. 2010); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundations*, 45 *HARVARD INT’L L. J.* 183, 184-86 (2004); Paige, *supra* note 47, at 135.

⁵⁰ David Stewart, *Some Perspectives on Universal Jurisdiction*, 102 *AM. SOC’Y INT’L PROC.* 397, 404 (2008). See also Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 *AJIL* 1, 3 (2011); O’Keefe, *supra* note 25, at 755-56; Princeton Principles, *supra* 25, at 45-48; Randall, *supra* note 10, at 788-89, 791-97, 801-10, 815-21; *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* §404 (1987); Michael P. Scharf, *Jurisdiction with Respect to Crime: Universal Jurisdiction and the Harvard Research*, in *THE HARVARD RESEARCH IN*

two separate, interrelated grounds. First, the prescriptive jurisdiction arising out of treaty obligations to extradite or prosecute is not based on any recognized jurisdictional link with an offense at issue.⁵¹ Therefore, treaties themselves, by analogy, impliedly embody and even mandate the use of universal jurisdiction.⁵² Second, universal jurisdiction developed over piracy and war crimes because they are ‘heinous’. Therefore, universal jurisdiction may be expanded unilaterally by states to other crimes of an equally heinous nature, including crimes contained in treaties and regardless of their actual text.⁵³ The heinous nature of crimes thus becomes the sole criterion for deciding whether or not universal jurisdiction exists over a particular crime. The analogy was alluded to by Judges Higgins et al. in the *Arrest Warrant* case.⁵⁴ The judges state that it is “necessary that universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international community. Piracy is the classical example.”⁵⁵ The judges propose *obiter dictum* that treaties which contain extradite or prosecute obligations “opens the door to a jurisdiction based on the heinous nature of the crime,” which they referred to as “perhaps a treaty-based provision for universal jurisdiction.”⁵⁶ The prevailing narrative is increasingly subject to question, which appears to have developed out of “a persistent reliance upon tentative secondary sources or the use of primary sources wholly out of context.”⁵⁷

INTERNATIONAL LAW: CONTEMPORARY ANALYSIS AND APPRAISAL 276-85 (John P. Grant & J. Craig Barker eds., 2007); Tomuschat, *supra* note 24, at 215-16.

⁵¹ *Id.* See further Part III, notes 124-139.

⁵² *Id.*

⁵³ The result of this view is manifestly absurd because states could simply override carefully negotiated treaty texts that either provide for extradite or prosecute obligations or make no provision for extraterritorial jurisdiction at all, such as the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277. It is also based on a misreading of the *obiter dictum* in the Lotus case, *supra* note 20, at 19.

⁵⁴ See also Attorney General of Israel v. Eichmann (Dist. Ct., Dec. 12, 1961), 36 ILR 5, 26; Eichmann (S. Ct.) *supra* note 28, at 290-300; Polyukhovich v. The Commonwealth of Australia and Another, 172 CLR 501, paras. 32-38 (1991) (Brennan, J.); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, paras. 147-56 (Int’l Crim. Trib. For the Former Yugoslavia, Dec. 10, 1998).

⁵⁵ Arrest Warrant, *supra* note 2, paras. 60-61 (Higgins et al., JJ., sep. op.).

⁵⁶ *Id.*, paras. 46, 61.

⁵⁷ Garrod (2014), *supra* note 9, at 199; Reydam, *supra* note 8, at 8.

E. *The Habré Case as Evidence for the Existence of Universal Jurisdiction*

Although the prevailing narrative is not new, it has been reinvigorated in response to the *Habré* case, with scholars and NGOs (the ILC and several delegations at the Sixth Committee) interpreting the ICJ's judgment as representing a broad call for universal jurisdiction.⁵⁸ For example, Professor Koutroulis suggests that the ICJ confirms the obligation to establish universal jurisdiction for crimes under the CAT⁵⁹ Professors Andenas and Weatherall go much further, arguing that the judgment develops the law of jurisdiction, in particular by “clarifying the obligation to extradite or prosecute ... [and] that the obligation is premised upon universal jurisdiction.”⁶⁰ According to the authors, the ICJ's judgment supports the notion that universal jurisdiction is “necessary” to fulfill treaty obligations to extradite or prosecute with respect to international crimes.⁶¹ In a similar vein, Professors Gilbert and Rüsch suggest that the ICJ in the *Habré* case reveals the “overlap” between extradite or prosecute and universal jurisdiction and the necessity for states as regards core international crimes to establish universal jurisdiction.⁶²

Amnesty International also interprets the *Habré* case as a “landmark” judgment with respect to the duty of states to investigate and prosecute crimes under international law based on universal jurisdiction.⁶³ Professor O’Keefe goes further still and expands the scope of universal jurisdiction beyond the narrow category of crimes under international law to encompass a broad

⁵⁸ For the impact of the *Habré* case on the ILC, see Part III.

⁵⁹ Vaïos Koutroulis, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, Max Planck Encyclopaedia of Public International Law (2014).

⁶⁰ Andenas & Weatherall, *supra* note 11, at 753, 768. See also ERROL P MENDES, GLOBAL GOVERNANCE, HUMAN RIGHTS AND INTERNATIONAL LAW. COMBATTING THE TRAGIC FLAW (2014), chapter 1; Thomas Weatherall, *Jus Cogens and Sovereign Immunity: Reconciling Divergence in Contemporary Jurisprudence*, 46 GEORGETOWN J. INT’L L. 1151, 1188 (2015).

⁶¹ *Id.* at 768.

⁶² Geoff Gilbert & Anna M Rüsch, *Jurisdictional Competence Through Protection. To What Extent Can States Prosecute the Prior Crimes of Those to Whom They Have Extended Refuge?*, 12 J. INT’L CRIM. J. 1093, 1102 (2014).

⁶³ *Supra* note 17, at 25.

range of crimes proscribed in extradite or prosecute regimes. Thus, the *Habré* case is referenced in order to reinforce the argument that, starting with the 1949 Geneva Conventions, universal jurisdiction is “mandated by the great majority of the conventions in the field of international criminal law.”⁶⁴

Similar sentiments have been expressed by some delegations during the work on universal jurisdiction at the Sixth Committee, with the Belarusian delegation welcoming the ICJ’s judgment for “clarifying aspects of the scope and application of the principle of universal jurisdiction”⁶⁵ and the Polish delegation commenting that the judgment underlines “that the best way of giving effect to the principle of *aut dedere aut judicare* was to prescribe universal jurisdiction.”⁶⁶

II. ICJ’S JUDGMENT IN THE HABRÉ CASE

A. Background

After taking power on 7 June 1982 at the head of a rebellion, Hissène Habré was president of Chad for eight years, during which time large-scale violations of human rights were allegedly committed in Chad, “including arrests of actual or presumed political opponents, detentions without trial or under inhumane conditions, mistreatment, torture, extrajudicial executions and enforced disappearances.”⁶⁷ The Habré regime was overthrown in 1990 by Habré’s former defense and security adviser, Idriss Déby Itno, current president of Chad, and

⁶⁴ ROGER O’KEEFE, INTERNATIONAL CRIMINAL LAW 324, 371, 397 (2015).

⁶⁵ UN Doc. A/C.6/69/SR.12, *supra* note 17.

⁶⁶ UN Doc. A/C.6/70/SR.12, *supra* note 17.

⁶⁷ Judgement, *supra* note 1, para. 1.

Habré fled to Senegal where he has lived ever since.⁶⁸ In 1993, the successive Chadian Government removed Habré's immunity so that Habré could be prosecuted.⁶⁹

On 30 November 2000, a Belgian national of Chadian origin filed a civil-party application with a Belgian investigating judge against Habré for, "*inter alia*, serious violations of international humanitarian law, crimes of torture and the crime of genocide".⁷⁰ Between 30 November 2000 and 11 December 2001, a further 20 persons, comprising two individuals of dual Belgian-Chadian nationality and eighteen Chadians, filed before the same judge for similar complaints against Habré. Belgium transmitted an international arrest warrant to Senegal and requested the extradition of Habré on 22 September 2005 and, five days later, Interpol issued a "red notice" pursuant to Habré's arrest.⁷¹

The *Chambre d'accusation* of the Dakar Court of Appeal rejected Belgium's jurisdiction over Habré in a judgment of 25 November 2005, finding that Habré should be granted "jurisdictional immunity", as a former Head of State, "for acts allegedly committed in the exercise of his functions".⁷² The following day, Senegal referred the matter to the AU.⁷³ The AU in a decision of 26 July 2006 decided that the *Habré* case fell within its competence and mandated Senegal to prosecute *Habré* case "on behalf of Africa".⁷⁴ Between March 2011 and January 2012, Belgium made three further extradition requests, which were declared

⁶⁸ *Id.*; I.C.J., Oral Proceedings, Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 11 (Mar. 19, 2012).

⁶⁹ *Id.*, para. 20; Human Rights Watch, *Chad Lifts Immunity of Ex-Dictator: Green Light to Prosecute Hissène Habré in Belgium* (2002), at www.hrw.org/news/2002/12/05/chad-lifts-immunity-ex-dictator.

⁷⁰ *Id.*, para. 19.

⁷¹ *Id.*, para. 21.

⁷² *Id.*, para. 22.

⁷³ *Id.*, para. 23.

⁷⁴ *Id.*

inadmissible by the *Chambre d'accusation* of the Dakar Court of Appeal in accordance with Senegalese extradition law.⁷⁵

In the wake of *Pinochet* and following a decade of campaigning by human rights NGOs,⁷⁶ Belgium instituted proceedings with the ICJ against Senegal on February 19, 2009 over a dispute concerning Senegal's compliance with its obligations arising under the CAT, as well as other obligations under customary international law, to prosecute Habré, or to extradite him to Belgium for the purpose of prosecution.⁷⁷ Notwithstanding the 40,000 murders and acts of torture that had been allegedly committed by the Habré regime,⁷⁸ a handful of the alleged victims attaining Belgian nationality is precisely why Belgium (the first state to seek to enforce its rights under the CAT before the ICJ) instituted proceedings against Senegal for the latter's failure to either prosecute Habré on Belgium's behalf or extradite him to Belgium.⁷⁹ For its part, Senegal announced that it would expel Habré to Chad—the state in whose territory the alleged crimes had occurred and the only other party to the CAT to express interest in Habré's prosecution—“but on no account outside Africa.”⁸⁰ However, the expulsion decision was suspended following a request made by the UN High Commissioner for Human Rights that Habré may be tortured and executed.⁸¹

⁷⁵ *Id.*, para. 40.

⁷⁶ Reydam, *supra* note 8, at 24-26.

⁷⁷ Judgment, *supra* note 1, para. 1.

⁷⁸ Report of National Commission of Inquiry of the Chadian Ministry of Justice, *The Crimes and Misappropriations Committed by ex-President Habré, his Accomplices and/or Accessories* (1992), in Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Application Instituting Proceedings (Feb. 19, 2009).

⁷⁹ Judgment, *supra* note 1, paras. 19-21; *id.*, paras. 21-23 (Sur, J., diss. op.). See also Application, *id.* at 3, 11, 15; Memorial of Belgium, Questions Relating to the Obligation to Prosecute or Extradite, 1, 11, 4, 13, 44, 52, 56-57, 79-80, 82 (Jul. 2010) (“Belgium Memorial”); I.C.J., Oral Proceedings, Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), paras. 3-4, 12-13 (Mar. 12, 2012).

⁸⁰ Oral Proceedings, *id.*, para. 40.

⁸¹ *Id.* Navi Pillay, UN High Commissioner for Human Rights (Jul. 10, 2011), at http://www.un.org/apps/news/story.asp?NewsID=38993&Cr=Chad&Cr1=#.V2v0E_krLIU.

One of the most important aspects of the *Habré* case is the ICJ's examination of the admissibility of Belgium's claim against Senegal. This is because the way in which the ICJ approached admissibility influenced its subsequent interpretation of the CAT's "object and purpose" and the "nature and meaning" of the obligation to extradite or prosecute in Article 7 of that instrument. It equally influenced the ICJ's approach to jurisdiction in Article 5 of the CAT.

B. Obligations Erga Omnes Parties as a Basis for the Proceedings

Belgium defended the admissibility of its claim based on a "special interest" with the *Habré* case, the existence of which distinguished "Belgium from the other parties to the Convention and gave it a specific entitlement in the case of Mr. Habré." Thus, Belgium was an "injured state" within the meaning of Article 42 of the Articles on State Responsibility and could invoke Senegal's responsibility on this basis.⁸² The "special interest" was that an investigation had been instigated in Belgium at the behest of a "Belgian national of Chadian origin," a victim of the Habré regime, and Belgian courts were permitted "to exercise passive personal jurisdiction" by virtue of Article 5(1)(c) of the CAT.⁸³ Belgium had thus "availed itself of its right under Article 5 to exercise its jurisdiction and to request extradition."⁸⁴ For its part, Senegal argued that Belgium was not entitled to invoke the international responsibility of Senegal for the alleged breach of its obligation under the CAT as "none of the alleged victims of the acts said to be attributable to Mr. Habré was of Belgian nationality at the time when the acts were committed."⁸⁵ During the proceedings, however, Belgium subsequently defended admissibility on a secondary argument: "[u]nder the Convention, every state party, irrespective of the

⁸² Responsibility of States for Internationally Wrongful Acts, Art. 42(b)(i), *in* Report of the ILC on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001).

⁸³ Judgment, *supra* note 1, para. 65.

⁸⁴ *Id.*

⁸⁵ *Id.*, para. 64.

nationality of the victims, is entitled to claim performance of the obligation concerned, and, therefore, can invoke the responsibility resulting from the failure to perform.”⁸⁶

The ICJ’s judgment focused solely on Belgium’s second basis of admissibility and held that Belgium, as a party to the CAT, had standing to invoke the responsibility of Senegal for the alleged breaches of its obligations under Articles 6 and 7 of the CAT.⁸⁷ The ICJ reasoned that, in view of the CAT’s object and purpose, states parties have a “common interest” to ensure that the perpetrators of torture do not enjoy impunity.⁸⁸ On the basis of this “common interest,” the ICJ asserted that:

[t]he obligations of a State party to conduct a preliminary inquiry into the facts and to submit the case to its competent authorities for prosecution are triggered by the presence of the alleged offender in its territory, regardless of the nationality of the offender or the victims, or of the place where the alleged offenses occurred. All the other States parties have a common interest in compliance with these obligations by the State in whose territory the alleged offender is present. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.⁸⁹

According to the ICJ, these obligations under the CAT may be defined as “*obligations erga omnes partes*,” within the meaning of Article 48 of the Articles on State Responsibility, “in the sense that each state party has a legal interest in the compliance with them in any given case.”⁹⁰ The “common interest in compliance” with the relevant obligations under the CAT, in the ICJ’s opinion, “implies” that each state party is entitled to invoke the responsibility of another party for the failure to comply with its obligations *erga omnes partes* and to bring that failure to an end.⁹¹ This finding meant that there was “no need” to pronounce on whether

⁸⁶ *Id.*

⁸⁷ *Id.*, para. 70.

⁸⁸ *Id.*, para. 68.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*, para. 69.

Belgium has a “special interest” with respect to Senegal’s compliance with the CAT under Article 5(1)(c) of the CAT.⁹²

The ICJ’s decision to focus solely on Belgium’s secondary argument means that there is no need for a state party to be specially affected by an alleged breach of the CAT before it may be able to invoke the international responsibility of another party and will have standing before the ICJ in order to do so. This decision was heavily criticized by the opinions appended to the ICJ’s judgment for not reflecting the CAT’s text.⁹³

C. Implications of Obligations Erga Omnes Parties for Extradite or Prosecute Obligations

The implications of the ICJ’s reasoning with regard to *obligations erga omnes partes* for extradite or prosecute obligations are twofold.

1. Protection of a Common Interest

First, having established that Belgium had standing to bring its claim against Senegal, the ICJ’s judgment portrays Belgium as exclusively protecting a “common interest” in the *Habré* case. In the words of the ICJ: “contracting States do not have any interests of their own; they merely have, one and all, a common interest.”⁹⁴ While Belgium requested that the ICJ declare that Senegal must, failing prosecution, extradite Habré “to Belgium without further ado,” the ICJ ultimately found more generally that Senegal must submit the *Habré* case for prosecution, “if it does not extradite him.”⁹⁵ Important questions unresolved by the ICJ remain as to whether Belgium has the right to request extradition and exercise jurisdiction over Habré under Article 5 of the CAT; to which state party Senegal must extradite Habré, failing prosecution; and which

⁹² *Id.*, para. 70.

⁹³ *Id.*, paras. 12 (Xue, J., diss. op.), 21, 31-32 (Abraham, J., sep. op.), 28 (Sur, J., diss. op.).

⁹⁴ *Id.*, para. 68.

⁹⁵ *Id.*, paras. 14, 118, 121.

state party other than Belgium, if any, would have competence under the CAT to request his extradition and prosecution.

The ICJ does not sufficiently explain the reason why a state party in whose custody the accused is present (that is, the Custodial State) has obligations to establish its jurisdiction over crimes committed by a foreign national abroad, under Article 5(2), and to initiate criminal proceedings in the absence of extradition, under Article 7, of the CAT. In that connection, the ICJ's judgment conflates two separate issues. To say that states parties to the CAT seek to protect a "common interest," for the purpose of monitoring treaty implementation and one party bringing a claim before the ICJ "concerning the cessation of an alleged breach by another State party," is one thing.⁹⁶ However, it is quite another to suggest that parties have "no interests of their own" in preventing impunity by requiring a Custodial State to establish jurisdiction and undertake a prosecution, failing extradition, under Articles 5(2) and 7. And yet, both are treated by the ICJ as one and the same, according to the CAT's supposed object and purpose: to protect a "common interest" by preventing impunity of the perpetrators of torture on behalf of all other parties.⁹⁷ In order to arrive at this conclusion, the ICJ had to overlook the text of Articles 5 and 7. As pointed out by Judge *ad hoc* Sur, the CAT's object and purpose, as determined by the ICJ, "superseded and removed all other considerations."⁹⁸

2. *ICJ's Treatment of Article 5(2) CAT*

Second, the ICJ's interpretation of the CAT's object and purpose as the protection of a "common interest" influenced its subsequent interpretation and the "nature and meaning" of the obligation to extradite or prosecute under Article 7 and the type of jurisdiction arising out of this

⁹⁶ *Id.*, para. 69.

⁹⁷ *Id.*, paras. 68, 74-75.

⁹⁸ *Id.*, para. 35 (Sur, J., diss. op.).

obligation under Article 5(2) of the CAT. Having determined the admissibility of Belgium's claim, the ICJ, throughout its judgment, described jurisdiction in Article 5(2) of the CAT as "universal jurisdiction."⁹⁹ In particular, the ICJ noted that the "obligation to establish universal jurisdiction" under Article 5(2) is a "necessary condition" for fulfilling the obligations to undertake a preliminary inquiry under Article 6(2) and to submit the case to its authorities for prosecution under Article 7(1).¹⁰⁰ The purpose of these obligations, in the ICJ's opinion, is to "enable proceedings to be brought against the suspect, in the absence of his extradition" and to "achieve the object and purpose" of the CAT, which is "to make more effective the struggle against torture by avoiding impunity for the perpetrators."¹⁰¹ In the words of the ICJ, "[t]he Convention against Torture thus brings together 150 states which have committed themselves to prosecuting suspects in particular on the basis of universal jurisdiction."¹⁰²

Contrary to the ICJ, analysis of the CAT's text and *travaux préparatoires, infra*, shows extradite or prosecute obligations do not give rise to universal jurisdiction. Paragraph 1 States have jurisdiction to prevent impunity because they have important links with an alleged offense.¹⁰³ Therefore, a Custodial State (Senegal in the *Habré* case) has an obligation under Article 5(2) of the CAT to initiate criminal proceedings and assert a type of treaty-based jurisdiction failing extradition to one of the Paragraph 1 States referred to in Article 5. Before doing so, the next Part examines the impact of the *Habré* case on other actors in the field of international law.

⁹⁹ *Id.*, para. 74.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*, paras. 74, 115.

¹⁰² *Id.*, para. 75.

¹⁰³ See also I.C.J., Oral Proceedings, Certain Criminal Proceedings in France (Dem. Rep. Congo v. France), 18 (Apr. 28, 2003).

III. APPLICATION OF *HABRÉ* ONTO UNIVERSAL JURISDICTION

A. ICJ's Affirmation of Universal Jurisdiction's Existence

The ICJ's description of Article 5(2) as "universal jurisdiction" is in passing, as if such an interpretation is beyond question. At first glance, this would appear to provide sanction by the World Court to the existence of universal jurisdiction in customary international law and its embodiment in the CAT. This is certainly the interpretation offered by the Separate Opinion of Judge Cançado Trindade when he asserts that the ICJ's judgment "captures the rationale of the CAT, with the latter's denationalization of protection, and assertion of the principle of universal jurisdiction."¹⁰⁴ Informed by "jusnaturalist thinking", Judge Cançado Trindade's reasoning for interpreting the extradite or prosecute obligation in the CAT as giving rise to universal jurisdiction is, in part, that the principle of universal jurisdiction itself has a "long" history in international law and is "set forth in the CAT" in Articles 5(2) and 7(1).¹⁰⁵ Therefore, the CAT, by establishing universal jurisdiction, "transcends the inter-State dimension, as it purports to safeguard not the interests of individual states, but rather the fundamental values shared by the international community as a whole."¹⁰⁶ One consequence of this interpretation of the CAT, which is not shared by the ICJ, is that all states are required to assert universal jurisdiction over alleged perpetrators of torture when found in their territory, "without limits in time (past or future) or in space" as to when the conduct occurred and regardless of when the CAT entered into force in the prosecuting state.¹⁰⁷ If taken to its logical conclusion, however, this would suggest that states are permitted by customary international law to assert universal jurisdiction

¹⁰⁴ Judgment, *supra* note 1, para. 123.

¹⁰⁵ *Id.*, para. 177 (Trindade, J., sep. op.).

¹⁰⁶ *Id.* See also Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Provisional Measures, 2009 I.C.J. REP. 139, paras. 63, 85, 105 (May 28) (Trindade, J., diss. op.).

¹⁰⁷ *Id.*

and initiate prosecutions independently of the CAT and its agreed text, and therefore regardless of the suspect being present within the prescribing state's territory and even if the prescribing state is not a party to this instrument at the relevant time when the conduct occurs. In the words of Judge Guillaume, this would "risk creating total judicial chaos."¹⁰⁸

Of the numerous opinions appended to the ICJ's judgement in the *Habré* case, only Judge Cançado Trindade argues that the principle of universal jurisdiction properly so called is codified in the CAT. Nonetheless, it will be recalled that scholars and NGOs interpret the ICJ's judgment as representing a broad call for universal jurisdiction.¹⁰⁹ The basis for this interpretation of the *Habré* case in scholarship is explained on two different rationales.

1. *Jus Cogens Create Universal Jurisdiction*

The first basis is the ICJ's passing reference that "torture is part of customary international law and it has become a peremptory norm (*jus cogens*)."¹¹⁰ According to this view, all states have obligations *erga omnes* to punish individual violators of *jus cogens*.¹¹¹ In order to perform these obligations, one legal effect of *jus cogens* is to provide universal jurisdiction over international crimes.¹¹² The notion that universal jurisdiction arises from *jus cogens* and obliges all states to prosecute international crimes is itself derived from the judicial *dicta* of two cases. The first of these is the *Furundzija* case, in which the International Criminal Tribunal for the Former Yugoslavia ("ICTY") notes that "it would seem that one of the consequences of the *jus*

¹⁰⁸ Arrest Warrant, *supra* note 2, para. 15 (Guillaume, J., sep. op.).

¹⁰⁹ Part I, notes 59-64.

¹¹⁰ Judgment, *supra* note 1, para. 99. *Jus cogens* constitute peremptory norms of international law "accepted and recognized by the international community of States as a whole from which no derogation is permitted," VCLT, May 23, 1969, 1155 UNTS 331, Art. 53.

¹¹¹ Obligations *erga omnes* are owed to the international community as a whole by virtue "of the importance of the rights involved, [whereby] all States can be held to have a legal interest in their protection ...," *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 ICJ REP. 3, paras. 33-34 (Feb. 5). On the meaning of obligations *erga omnes*, see *Responsibility of States for Internationally Wrongful Acts*, *supra* note 82, Arts. 40-41, 56.

¹¹² Andenas and Weatherall, *supra* note 11, at 762-64; Weatherall, *supra* note 60, at 1154-55; ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 288-319, 340-357 (2006). See also Judgment, *supra* note 1, paras. 82-177 (Trindade, J., sep. op.); Tomuschat, *supra* note 24, at 373.

cogens character” of torture is that every state is entitled to punish individuals accused of torture based on universal jurisdiction.¹¹³ Second, the *Pinochet* case, in which Lord Browne-Wilkinson, citing *Furundzija*, comments that “[t]he jus cogens nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed.”¹¹⁴ Although neither of these cases are examples of assertions of universal jurisdiction or concerned the examination of universal jurisdiction,¹¹⁵ the *Pinochet* case is, nonetheless, depicted in scholarship as the most important contemporary example of the exercise of universal jurisdiction and the rise of a new international legal order.¹¹⁶ Under this proposed legal order, any state is permitted to exercise universal jurisdiction over certain crimes, regardless of the status of alleged perpetrators and the immunity to which they may be entitled under international law, for the protection of human rights.¹¹⁷

This interpretation of the relationship between universal jurisdiction and treaty obligations to extradite or prosecute, especially in light of the *Habré* case, is problematical on at least two fronts. First, the opinions expressed in *Pinochet* and *Furundzija* are lone voices; and there is considerable judicial opinion to the contrary that, even when a crime amounts to a *jus*

¹¹³ *Furundzija*, *supra* note 54, para. 156.

¹¹⁴ *R v. Bow St. Metro. Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3) [1999] 2 All E.R. 97 (1999), 107 (Lord Browne-Wilkinson). Lord Millett was also of the opinion that crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale and international character of the Holocaust that they can justly be regarded as an attack on the international legal order, *id.* at 175-76.

¹¹⁵ The only authority in support of the propositions advanced in *Furundzija* and *Pinochet* are judicial *dicta* in *Eichmann* (S. Ct.), *supra* note 28, and *Demjanjuk*, *supra* note 28. As explained in Parts IV & V, neither of these latter cases are examples of universal jurisdiction either; and in both cases the relationship between universal jurisdiction, *jus cogens* and treaty obligations to extradite or prosecute is not examined.

¹¹⁶ *E.g.*, Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. INT’L L. J. 927, 928, 932, 940, 954 (2009); Langer, *supra* note 11, at 246-47; Langer, *supra* note 50, at 1, 4, 18 (2011); Ved P Nanda, *Universal Jurisdiction: It’s Back!*, 102 AM. SOC’Y INT’L PROC. 397, 398 (2008); Princeton Principles, *supra* note 25, at 40-41.

¹¹⁷ For a critical appraisal of the narrative that *Pinochet* ushered in a new era of criminal accountability for egregious violations of human rights, see Ingrid Wuerth, *Pinochet’s Legacy Reassessed*, 106 AJIL 731 (2012).

cogens prohibition, this does not have the legal effect of creating procedural rules, including universal jurisdiction.¹¹⁸ Even though the ICJ in the *Habré* case declared the status of torture as a crime under customary international law, the ICJ was not prepared to recognize the existence of a customary rule of universal jurisdiction over this or any other crime. Nor does the ICJ refer to *Pinochet* and *Furundzija* or express that universal jurisdiction has any relationship to international crimes or to *jus cogens*. This would suggest that, in the ICJ's opinion, international crimes do not automatically give rise to universal jurisdiction, irrespective of whether the crime in question has attained the status of *jus cogens*.¹¹⁹

Second, the ICJ has not recognized which international crimes, other than genocide and torture, belong to *jus cogens*.¹²⁰ Universal jurisdiction is supposed to be limited to a limited category of crimes under international law, but most of the crimes contained in treaties creating extradite or prosecute obligations are not heinous or do not have the status of being criminalized under international law, such as war crimes, genocide and crimes against humanity, while many states are not parties to them.¹²¹ It is not clear how extradite or prosecute regimes give rise to universal jurisdiction for international crimes but the exact same regimes do not with respect to treaty crimes. Nor is it clear how the categorization of a crime as a *jus cogens* prohibition has the ability to change the agreed jurisdictional provisions contained in treaty obligations to extradite

¹¹⁸ *E.g.*, *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No. 1) [1998] 4 All E.R. 897, 913 (Lord Slynn); *Pinochet* (No. 3), *supra* note 114, at 147 (Lord Hope); *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia and another* (Secretary of State for Constitutional Affairs and others intervening); *Mitchell and others v. Al-Dali and others* [2006] UKHL 29; *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), 2012 I.C.J. REP. 99, paras. 83, 96 (Feb. 3). *See also* Dapo Akande & Sangeeta Shah, *Immunities of State Officials, International Crimes, and Foreign Domestic Courts*, 21 EJIL 815, 836 (2011); Yee, *supra* note 7, paras. 4-7.

¹¹⁹ *See also* *Pinochet* (No. 1), *id.* at 913 (Lord Slynn); *Pinochet* (No. 3), *supra* note 114, at 116 (Lord Goff).

¹²⁰ *See* Application of Convention on Prevention and Punishment of Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. REP. 43, paras. 147, 162 (Feb. 26); *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Rwanda), *Jurisdiction and Admissibility*, 2006 I.C.J. REP. 6, para. 64 (Feb. 3).

¹²¹ Treaties creating extradite or prosecute obligations contain provisions by which the relevant acts are qualified as criminal offenses and states undertake to make them punishable under their domestic laws (states have considerable discretion on how offenses and the elements of offenses are defined in their domestic laws).

or prosecute, especially when such treaties make no mention of *jus cogens*. In this regard, there is difficulty connecting the majority of extradite or prosecute treaty regimes to the protection of international community values, which is at the heart of the universal jurisdiction concept.¹²² Indeed, most treaties providing for extradite or prosecute obligations explicitly concern the protection of state interests.¹²³

2. Universal Jurisdiction Analogy

The second basis for interpreting the ICJ's judgment in the *Habré* case as support for universal jurisdiction is the existence of universal jurisdiction in customary international law independently of treaties. According to this view, universal jurisdiction has its origins in centuries-old custom and an excellent pedigree, while states typically use this type of jurisdiction in their national legislation in implementing treaty obligations to extradite or prosecute. And, as with universal jurisdiction, the prescriptive jurisdiction arising out of treaty obligations to extradite or prosecute and the national laws implementing them is—to quote the words of the UN Secretariat—“not conditioned by any jurisdictional considerations of States.”¹²⁴ Rather, such jurisdiction is based solely on the suspect's “presence” in the prosecuting state's territory and does not establish a “genuine link” to that state.¹²⁵ Put in slightly different terms, a state is obliged to establish its jurisdiction over an offender found in its territory in the absence of any other lawful prescriptive jurisdictional link; that is, even if the offense occurs outside its territory and neither the offender nor the victims are of its nationality and its national interests are not threatened. Therefore, treaties containing extradite or prosecute obligations, by analogy, embody

¹²² Part I, notes 27-28.

¹²³ See also Claus Kreß, *Universal Jurisdiction over International Crimes and the Institut de Droit International*, 4 J. INT'L CRIM. JUST. 561, 566-67 (2006).

¹²⁴ Secretariat survey, *supra* note 30, para. 44. See also RESTATEMENT (FOURTH), *supra* note 11, Reporters' Notes 2-3.

¹²⁵ Tomuschat, *supra* note 24, at 222; *id.* at 267 (Dinstein), 290-91 (Bernandez).

and even mandate the use of universal jurisdiction (regardless of actual treaty text or the status of the substantive crime at issue in international law or as *jus cogens*).¹²⁶

This reading of the jurisdiction arising out of the extradite or prosecute obligation in the CAT—by placing emphasis on universal jurisdiction in custom and state practice—is equally problematic because it is based on the prevailing narrative that universal jurisdiction is well established in customary international law and can be analogized with jurisdiction in treaty obligations to extradite or prosecute.¹²⁷ The assumption that universal jurisdiction exists in customary international law at present, regardless of its lack of historical foundations, is open to question in the light of empirical data on state practice.¹²⁸ Nonetheless, this reading of the CAT has been adopted by leading scholars,¹²⁹ the UN Committee against Torture;¹³⁰ some states and judicial opinions;¹³¹ and the Institute of International Law.¹³² The same reading in numerous treaties other than the CAT has been made by several delegations during work on universal

¹²⁶ E.g., O’Keefe, *supra* note 25, at 746-47, 754-55; O’Keefe, *supra* note 41, at 817, 826; Nanda, *supra* note 116.

¹²⁷ Part I, notes 50-56.

¹²⁸ Part IV, notes 258-83.

¹²⁹ E.g., Andenas & Weatherall, *supra* note 11, at 768; Richard Dicker, *A Few Reflections on the Current Status and Future Direction of Universal Jurisdiction Practice*, 107 AM. SOC’Y INT’L PROC. 233, 235 (2013); Langer, *supra* note 50, at 4; Liesbeth Zegveld, *The Bouterse Case*, 32 NETH. Y.B. INT’L L. 97 (2001); MANFRED NOWAK & ELIZABETH MCARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE. A COMMENTARY* 254 (2008); Cedric Ryngaert, *Universal Criminal Jurisdiction over Torture: A State of Affairs After 20 Years UN Torture Convention*, 23 NQHR 571 (2005).

¹³⁰ UN Committee against Torture, *Suleymane Guengueng et al. v. Sen.*, Communication No. 181/2001, CAT/C/36/D/181/2001, paras. 6(4), 9(5) (May 17, 2006).

¹³¹ Ould Dah (Cass., Oct. 23, 2002) (France), at www.internationalcrimesdatabase.org/Case/998; Ould Dah v. France, App. No. 13112/03 (Eur. Ct. H.R. Mar. 17, 2009); Pinochet (No. 3), *supra* note 114, at 108-11 (Lord Browne-Wilkinson), 177-78 (Lord Millett); Furundžija, *supra* note 54, para. 156; Certain Criminal Proceedings in France, *supra* note 103, at 13-16; Southern Africa Litigation Centre and Another v. National Director of Public Prosecutions and Others, [2012] ZAGPPHC 61; Note submitted to Office of Legal Affairs (Spain), para. 14 (Apr. 29, 2013), at www.un.org/en/ga/sixth/68/UnivJur/Spain_E.pdf; Note submitted to Office of Legal Affairs (Sweden), 3 (May 29, 2013), at www.un.org/en/ga/sixth/68/UnivJur/Sweden.pdf; secretary-general report (2010), *supra* note 18, paras. 21-22; UN GAOR, 68th Sess., 13th mtg., para. 13 (South Africa), UN Doc. A/C.6/68/SR.13 (Jan. 6, 2014).

¹³² Tomuschat, *supra* note 24, at 336, 374-75, 387.

jurisdiction at the Sixth Committee;¹³³ AU-EU report;¹³⁴ ICRC;¹³⁵ Institute of International Law;¹³⁶ American Law Institute;¹³⁷ NGOs,¹³⁸ and in the burgeoning scholarship that has sought to clarify the universal jurisdiction concept.¹³⁹ Perhaps most importantly, in the light of the *Habré* case, this reading has also been endorsed by the ILC during its work on the topic “obligation to extradite or prosecute”.

B. ILC’s Final Report On Treaty Obligations To Extradite Or Prosecute

After almost a decade of study, in 2014 the ILC at its sixty-sixth session decided to expedite the topic and adopt a Final Report on the obligation to extradite or prosecute.¹⁴⁰ The ICJ’s judgment in the *Habré* case was delivered before the ILC had opportunity to complete its work on this topic. In reliance on the *Habré* case, the Final Report adopts the ICJ’s reference to “universal jurisdiction”¹⁴¹ and cites the *Habré* case to support the proposition that it may be helpful for elucidating the meaning of numerous other conventions that have used the same Hague formula.¹⁴² Consistent with the trend in the ILC’s practice during the past fifteen years, the outcome of the ILC’s work on the extradite or prosecute topic is packaged as a Final Report,

¹³³ E.g., secretary-general report (2010), *supra* note 18, paras. 21-22; UN secretary-general report, The Scope and Application of the Principle of Universal Jurisdiction, paras. 121-28, UN Doc. A/66/93 (2011); UN GAOR, 64th Sess., 12th mtg., paras. 23-24 (Switzerland), 67 (Thailand), 77 (France), 85 (Germany), UN Doc. A/C.6/64/SR.12 (Oct. 20, 2009); UN GAOR, 64th Sess., 13th mtg., paras. 16 (Russian Federation), 30 (Liechtenstein), 37 (Malaysia), 44 (Italy), UN Doc. A/C.6/64/SR.13 (Oct. 21, 2009); UN GAOR, 65th Sess., 10th mtg., para. 77 (Belarus), UN Doc. A/C.6/65/SR.10 (Oct. 13, 2010); UN GAOR, 65th Sess., 11th mtg., paras. 37-38 (US), 40 (Belgium), 73 (Germany), UN Doc. A/C.6/65/SR.11 (Oct. 13, 2010).

¹³⁴ AU-EU report, *supra* note 25, paras. 9, 11, 16, 22-23.

¹³⁵ Note submitted to Office of Legal Affairs (ICRC) (Apr. 30, 2013), at www.un.org/en/ga/sixth/68/UnivJur/ICRC.pdf.

¹³⁶ IIL, *supra* note 26, para. 2.

¹³⁷ RESTATEMENT (THIRD), *supra* note 50. See also RESTATEMENT (FOURTH), *supra* note 11.

¹³⁸ Amnesty International, *Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, AI Index IOR 53/003/2001, Aug. 2001.

¹³⁹ E.g., Jean D’Aspremont, *Multilateral versus Unilateral Exercises of Universal Jurisdiction*, 43 ISR. L. REV. 301, 307 (2010); Jamie Mayerfield, *Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights*, 25 HUM. RTS. Q. 93, 112 (2003); Nanda, *supra* note 116, at 397; O’Keefe, *supra* note 25, at 746-47, 755; O’Keefe, *supra* note 41, at 817, 826.

¹⁴⁰ UN Doc A/69/10, *supra* note 12.

¹⁴¹ *Id.* at 149-50.

¹⁴² *Id.* at 148.

rather than a set of draft articles (draft treaty) for the purpose of eventual codification by states.¹⁴³ Nonetheless, it was submitted to the UN General Assembly for dissemination and is “intended to assist States” in the implementation of their treaty obligations and advance understanding in this key area of international law.¹⁴⁴ As with other reports recently produced by the ILC, such as the report on the “Fragmentation of International Law”,¹⁴⁵ the Final Report, by not comprising draft articles, has potential to impact a wider audience of actors in the field of international law, “one made up not just of states, but also of attorneys, judges, policymakers, and academics.”¹⁴⁶

On closer analysis, however, the reports of the Special Rapporteur and the preparatory work of the ILC’s Working Group, on which the Final Report is based, reveals that what the ILC really means by the term “universal jurisdiction” is not really universal at all.

C. Special Rapporteur Rules Out Universal Jurisdiction

In his preliminary remarks on the obligation to extradite or prosecute topic, the ILC’s special rapporteur, having studied the inclusion of such obligations in various treaties since 1970, suggested that there had been created a “principle of universality of suppression.”¹⁴⁷ The special rapporteur proceeded to caution that:

¹⁴³ On the ILC’s recent move in practice from the production of draft articles, which the ILC had typically produced as the outcome of its work for most of its history, to outcomes more likely than not to be described as something other than draft articles, see Jacob K. Cogan, *The Changing Form of the International Law Commission’s Work*, AJILUnbound (Mar. 27, 2014), at <https://www.asil.org/blogs/changing-form-international-law-commission%E2%80%99s-work>. Murphy suggests that the issuance of reports, rather than draft articles, may be necessary for the ILC to remain relevant, Sean D. Murphy, *Deconstructing Fragmentation: Koskenniemi’s 2006 ILC Project*, 27 Temple Int. Comp. Law J. 293, 306 (2014).

¹⁴⁴ UN Doc A/69/10, *supra* note 12, at 140.

¹⁴⁵ Report of the ILC on the Work of Its Fifty-Eighth Session, UN GAOR, 58th Sess., Supp. No. 10, chapter XII, UN Doc A/61/10 (2006). On the impact of this ILC report, see Murphy, *supra* note 143.

¹⁴⁶ The extent to which governments and other actors in the field of international law have actually consulted and relied upon the Final Report since 2014 is hard to gauge. As Murphy, *id.* at 299, rightly notes: “One would not necessarily expect a practitioner to cite to the ‘manual’ that comes with his toolbox; rather, she just uses the tools.”

¹⁴⁷ Report of the ILC on the Work of its Fifty-Sixth Session, UN GAOR, 59th Sess., Supp. No. 10, annex, para. 9, UN Doc. A/59/10 (2004).

[t]he principle of universality of suppression should not be identified, however, with the principle of universality of jurisdiction The universality of suppression in this context means that, as a result of application of the obligation to extradite or prosecute between States concerned, there is no place where an offender could avoid criminal responsibility and could find so-called “safe haven.”¹⁴⁸

He therefore made clear that the principle of universal jurisdiction “is not directly connected with the obligation to extradite or prosecute.”¹⁴⁹ The same opinion was subsequently reiterated in the special rapporteur’s reports submitted to the General Assembly.¹⁵⁰ However, some of the ILC’s members regarded universal jurisdiction as “instrumental to the full operation of the obligation to extradite or prosecute”¹⁵¹ and therefore one of the main problems in need of resolution is the question of “what kind of relationship – if it is supposed that such a relationship exists – between the obligation *aut dedere aut judicare* and the concept of universal jurisdiction should be accepted”¹⁵² In fact, at no point was the universal jurisdiction concept or its relationship with extradite or prosecute obligations, if any, examined by the special rapporteur or the ILC. But this relationship was given some initial consideration, perhaps hastily, by the ILC’s Working Group in reaction to the ICJ’s judgment in the *Habré* case.

D. ILC’s Working Group

Of the numerous legal questions identified by the Working Group, one of them was the relationship between the “The obligation to extradite or prosecute and the principle of universal

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Special Rapporteur (preliminary report), The obligation to extradite or prosecute (*aut dedere aut judicare*), para. 18, UN Doc. A/CN.4/571 (2006). Special Rapporteur, second report on the obligation to extradite or prosecute (*aut dedere aut judicare*), paras. 16, 45, UN Doc. A/CN.4/585 & Corr.1 (2007).

¹⁵¹ UN Doc. A/CN.4/585, *id.*, para. 34.

¹⁵² Special Rapporteur, third report on the obligation to extradite or prosecute (*aut dedere aut judicare*), para. 38, UN Doc. A/CN.4/603 (2008).

jurisdiction (does one necessarily imply the other?).”¹⁵³ The *Habré* case prompted the Working Group to hold a “specially-convened” meeting and evaluate this question in 2012.¹⁵⁴ The following year, in 2013, the Working Group adopted a report citing with approval the ICJ’s reference to “universal jurisdiction.”¹⁵⁵ In this report, at no point did the Working Group analyze the ICJ’s judgment critically or in depth; rather, the judgment is viewed as “helpful in elucidating some aspects relevant to the implementation of the obligation to extradite or prosecute.”¹⁵⁶

Controversially, on the “necessary jurisdiction” in order to implement treaty obligations to extradite or prosecute, the report, relying on the *Habré* case, states that when the crime was allegedly committed abroad with no nexus to the forum State, the obligation to extradite or prosecute would necessarily reflect an exercise of universal jurisdiction, which is “the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events” where neither the victims nor alleged offenders are nationals of the forum State and no harm was allegedly caused to the forum State’s own national interests.¹⁵⁷ However, the obligation to extradite or prosecute can also reflect an exercise of jurisdiction under other bases. Thus, if a State can exercise jurisdiction on another basis, universal jurisdiction may not necessarily be invoked in the fulfilment of the obligation to extradite or prosecute.¹⁵⁸

The Working Group’s report proceeds to suggest that several treaties, such as the very widely ratified 1949 Geneva Conventions and the CAT, “require the exercise of universal

¹⁵³ Report of the ILC on the Work of its Sixtieth Session, UN GAOR, 63rd Sess., Supp. No. 10, para. 204, UN Doc. A/63/10 (2008).

¹⁵⁴ Report of the ILC on the Work of its Sixty-Fourth Session, UN GAOR, 67th Sess., Supp. No. 10, paras. 208, 220, UN Doc. A/67/10 (2012).

¹⁵⁵ Working Group Report, Obligation to extradite or prosecute (aut dedere aut judicare), para. 24 & n.43, UN Doc. A/CN.4/L.829 (2013).

¹⁵⁶ *Id.*, para. 21.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*, para. 24.

jurisdiction over the offenses covered by these instruments.”¹⁵⁹ It also cites with approval the ICJ’s *dictum* referring to “universal jurisdiction” and seemingly treats it as reflecting existing *lex lata*.¹⁶⁰ And yet, the report does not examine universal jurisdiction or explain what the Working Group means by this term.

1. Working Methods and Sources of Evidence in Support of Universal Jurisdiction

The above quoted passage raises two important issues. The first concerns the working methods and sources of evidence relied upon by the Working Group, while the second pertains to the meaning of “universal jurisdiction” and the Working Group offering a different interpretation of jurisdiction arising out of extradite or prosecute obligations to that of the ICJ. Turning to the first issue, the reference to “universal jurisdiction” is supported by only one tentative, secondary source. The scholarly work cited by the Working Group places great emphasis of the accused’s ‘presence’ in the Custodial State’s territory as the sole basis for interpreting jurisdiction as “universal.”¹⁶¹

The Working Group had before it a working paper prepared by the special rapporteur.¹⁶² In this paper, the special rapporteur states that the 1949 Geneva Conventions and numerous subsequent treaties using the Hague formula “envisage an obligation to exercise universal jurisdiction.”¹⁶³ The only source of evidence on which the special rapporteur relies to support the above proposition is a “survey of multilateral conventions,” prepared by the UN Secretariat.¹⁶⁴

¹⁵⁹ *Id.*, para. 24 & n.34.

¹⁶⁰ *Id.*, para. 24 & n.43.

¹⁶¹ MITSUE INAZUMI, *UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW* 122 (2005).

¹⁶² Special Rapporteur, Bases for discussion in the Working Group on the topic “The obligation to extradite or prosecute (aut dedere aut judicare),” UN Doc. A/CN.4/L.774 (2010).

¹⁶³ *Id.*, para. 14.

¹⁶⁴ Secretariat survey, *supra* note 30.

However, the survey does not provide any evidence in support of this finding either.¹⁶⁵ To its credit, the survey does have regard to the preparatory works of the Geneva Conventions, although such works are cited wholly out of their proper historical context.¹⁶⁶ In particular, the survey quotes the “principle of universality” referred to during the Diplomatic Conference for the adoption of the 1949 Geneva Conventions. As will be explained, however, this term was a reference to the universal application of the extradite or prosecute obligation to all parties, including neutrals, and not universal jurisdiction proper.¹⁶⁷

The special rapporteur is also influenced by the adoption of a resolution on universal jurisdiction in 2005 by the Institute of International Law. In his opinion, the resolution shows a “mutual relationship and – to some extent – an interdependence between universal jurisdiction and the obligation *aut dedere aut judicare*.”¹⁶⁸ The resolution not only treats “universal jurisdiction” as an *existing* customary rule over international crimes, in particular genocide, crimes against humanity and war crimes.¹⁶⁹ It goes one step further and declares that universal jurisdiction “can also be established” in treaty obligations to extradite or prosecute.¹⁷⁰ A closer analysis of the Institute’s preparatory work shows that neither of these propositions was based on existing state and treaty practice, not least the *Arrest Warrant* case and Belgium - the self-acclaimed pioneer of universal jurisdiction - abolishing the provision for such jurisdiction in its national law in 2003 “owing to the abuse of this legislation.”¹⁷¹ Moreover, the Institute adopts as a basis for its work advocacy organizations (such as Amnesty International, International Law

¹⁶⁵ *Id.*, paras. 44, 90, 94, 144 & n.251.

¹⁶⁶ *Id.*, paras. 49-57.

¹⁶⁷ Part V, notes 351-69.

¹⁶⁸ UN Doc. A/CN.4/603, *supra* note 152, para. 47.

¹⁶⁹ *III*, *supra* note 26, paras. 1, 3.

¹⁷⁰ *Id.*, para. 2.

¹⁷¹ The Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*), para. 15, UN Doc. A/CN.4/612 (2009). See also Note submitted to Office of Legal Affairs (Belgium), para. 15, (visited Jun. 23, 2017), at www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Belgium_E.pdf.

Association and Princeton Project) and a selective handful of scholars, all of which adopt the prevailing narrative and make over-exaggerated claims of the existence of universal jurisdiction in custom and confuse it with treaty obligations to extradite or prosecute.¹⁷² Yet, in the opinion of the Institute’s rapporteur, such works “prove that universal jurisdiction is a principle already widely recognized under international instruments.”¹⁷³

2. ILC Should Define Universal Jurisdiction

The second important issue raised by the above quoted passage is the meaning of “universal jurisdiction.” The quotation refers to the applicability of “universal jurisdiction” over a crime committed abroad having “no nexus to the forum State.”¹⁷⁴ As will be explained, *infra*, jurisdiction in treaty obligations to extradite or prosecute has important links to one or more of the parties to the relevant treaty regime.¹⁷⁵ As jurisdiction is based on treaty, proof that “harm was allegedly caused to the forum state’s own national interests,” to quote the Working Group’s words, is not required.¹⁷⁶ The Custodial State, by failing to extradite, either protects the national vital interests of Paragraph 1 States or its own interests. The quotation immediately proceeds to explain what the Working Group means by universal jurisdiction, which is nothing more than “the jurisdiction to establish a territorial jurisdiction over persons for extraterritorial events.”¹⁷⁷ The latter statement is a quotation of Judges Higgins et al. in the *Arrest Warrant* case.¹⁷⁸ And yet, the judges in this case emphasize that jurisdiction in treaty obligations to extradite or prosecute is not universal jurisdiction and that such “loose use of language” should be

¹⁷² Tomuschat, *supra* note 24, at 216-17, 222, 234.

¹⁷³ *Id.* at 217.

¹⁷⁴ *Supra* note 157.

¹⁷⁵ *See also* Part I, notes 44-45.

¹⁷⁶ *Supra* note 157.

¹⁷⁷ *Id.*

¹⁷⁸ *Arrest Warrant*, *supra* note 2, para. 42 (Higgins et al., JJ., joint sep. op.).

avoided.¹⁷⁹ This would suggest that whatever the Working Group may have meant by the term “universal jurisdiction” (which is not clear), it does not mean universal jurisdiction proper. In any event, the Working Group is not wholly convinced or unanimous that such jurisdiction is universal either. Thus, the above quotation states that jurisdiction in the obligation to extradite or prosecute would “*reflect* an exercise of universal jurisdiction,” which is different from the finding that it *is* universal jurisdiction.¹⁸⁰ It further suggests that the obligation to extradite or prosecute “can also reflect an exercise of jurisdiction under other bases” and that “universal jurisdiction may not necessarily be invoked in the fulfilment of the obligation to extradite or prosecute.”¹⁸¹ To suggest that jurisdiction in extradite or prosecute obligations is chameleon-like, with the ability to reflect territorial jurisdiction at one end of the continuum and universal jurisdiction at the other, makes little sense and does not sit neatly with the actual wording of the relevant treaty provisions.

In all likelihood, the Working Group’s cumbersome and convoluted description of jurisdiction implementing extradite or prosecute obligations as “territorial,” “universal” and “other bases” of jurisdiction was aimed at garnering compromise among delegations at the Sixth Committee.¹⁸² In this regard, the ILC’s Final Report does not provide authority for interpreting the jurisdiction arising out of extradite or prosecute obligations as universal jurisdiction proper.

In sum, the idea that the prescriptive jurisdiction arising out of treaty obligations to extradite or prosecute is not based on any recognized jurisdictional link and therefore can, by analogy, be read to impliedly embody and even mandate the use of universal jurisdiction is based

¹⁷⁹ *Id.* See also UN Doc. A/CN.4/690, *supra* note 6, para. 113.

¹⁸⁰ *Supra* note 157 (*italic added*).

¹⁸¹ *Supra* note 158.

¹⁸² *E.g.*, Topical summary of the discussion held in the Sixth Committee of the General Assembly during its Sixtieth Session, para. 243, UN Doc. A/CN.4/560 (2006).

on three fundamental premises: namely that the concept of universal jurisdiction is widely used in state practice and exists in customary international law at present; the actual text of relevant treaty provisions supports such a reading; and the ICJ in the *Habré* case recognized the existence of universal jurisdiction in international law and its embodiment in the CAT.

IV. THE CASE AGAINST *HABRÉ* SUPPORTING UNIVERSAL JURISDICTION

This Part argues that the *Habré* case does not support the existence of universal jurisdiction in international law and that jurisdiction in treaty obligations to extradite or prosecute is incapable of giving rise to universal jurisdiction. In so doing, it begins by showing that the ICJ's references to "universal jurisdiction" in the *Habré* case are little more than *dicta* and therefore caution is needed in according them weight. Thereafter, this Part analyzes the text of Articles 5 and 7 of the CAT and their *travaux préparatoires*, both of which are bypassed by the ICJ, in order to show that treaty obligations to extradite or prosecute do not give rise to universal jurisdiction. To suggest otherwise results in the actual text, creating significant jurisdictional links with states parties to the CAT, being disregarded. Analysis in this Part focuses on the CAT, in the light of the *Habré* case, but it applies equally to the numerous other treaties that create extradite or prosecute obligations, most of which use the same Hague formula as the CAT. Lastly, this Part presents the findings of an empirical analysis of state practice in order to show that universal jurisdiction does not exist under customary international law at present and that common examples of universal jurisdiction state practice are actually different types of treaty-based jurisdiction.

A. ICJ's Reference to Universal Jurisdiction Reduced to *Obiter Dictum*

The ICJ's characterization of jurisdiction in Article 5(2) of the CAT as "universal jurisdiction" in the *Habré* case does not constitute a meaningful pronouncement of universal jurisdiction's existence in customary international law or its relationship, if any at all, with treaty

obligations to extradite or prosecute.¹⁸³ In this case, the ICJ rejects that it has jurisdiction to adjudicate Belgium's complex and controversial claims relating to customary international law, including the existence of a customary rule of universal jurisdiction over war crimes, crimes against humanity and genocide.¹⁸⁴ The ICJ therefore refuses to rule on universal jurisdiction's legality in customary international law and provides no supporting analysis of the existence of such a rule over the crime of torture.¹⁸⁵ The ICJ finds that it has jurisdiction solely to adjudicate obligations under the CAT. However, it leaves unexplained what is meant by "universal jurisdiction" or the intended effect of the use of such nomenclature for the development of the international law of jurisdiction.¹⁸⁶ This is because the ICJ finds that, insofar as Article 5(2) is concerned, it has "no jurisdiction in this case."¹⁸⁷ The merits of the case, over which the ICJ has jurisdiction, are limited to the determination of what, in the ICJ's opinion, is the nature and meaning of the obligations under Articles 6 and 7 of the CAT, and whether such obligations had been violated by Senegal.¹⁸⁸ As a result, the ICJ's references to "universal jurisdiction," in only a limited number of paragraphs and absent, as they are, of any substantive reasoning, is reduced to mere *obiter dictum*.¹⁸⁹

In all likelihood, the ICJ's references to "universal jurisdiction" impliedly follow the earlier decision of the UN Committee against Torture in the *Habré* case.¹⁹⁰ Belgium relied on the same decision in the present case as evidence that Article 5(2) codified a customary rule of

¹⁸³ See also Sienho Yee, *A Call for a More Rigorous Assessment of Universal Jurisdiction*, 107 AM. SOC'Y INT'L PROC. 233, 245 (2013).

¹⁸⁴ Judgment, *supra* note 1, paras. 53-55. See also Belgium Memorial, *supra* note 79, at 72; I.C.J., Oral Proceedings, Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), paras. 28-30, 33 (Mar. 13, 2012).

¹⁸⁵ See also Judgment, *id.*, para. 30 (Abraham, J., sep. op.).

¹⁸⁶ Yee, *supra* note 183, at 245.

¹⁸⁷ Judgment, *supra* note 1, para. 74.

¹⁸⁸ Art. 6 provides an obligation to conduct a preliminary enquiry, while Art. 7 provides an obligation to extradite or prosecute, *supra* note 3.

¹⁸⁹ Yee, *supra* note 183.

¹⁹⁰ Suleymane Guengueng, *supra* note 130.

“universal jurisdiction.”¹⁹¹ However, the Committee did not explain what it meant by “universal jurisdiction” either. It follows from the foregoing that one should probably refrain from reading too much into the ICJ’s references to “universal jurisdiction” the *Habré* case.

As the ICJ had no jurisdiction over Article 5(2),¹⁹² this raises the question whether the ICJ should have chosen to describe this article as an “obligation to establish universal jurisdiction” at all, especially as this term is misleading in the absence of any explanation of its meaning and the potential of the court’s jurisprudence to impact other actors in the field of international law, not least states, national and regional courts, the ILC, and academics. This issue becomes of great importance when one considers that the Hague formula of the extradite or prosecute obligation is the same as that used in three-quarters of the criminal law conventions adopted since 1970.¹⁹³ And several states have made excessive claims of the applicability of universal jurisdiction over a wide range of treaty crimes, leading to inter-state disputes and little progress during the work on the universal jurisdiction topic at the Sixth Committee due to incessant disagreement on the basic concept, definition and scope of universal jurisdiction.¹⁹⁴ The sections that follow will therefore aim to show that the ICJ erred in referring to Article 5(2) as “universal jurisdiction” (regardless of what was meant by the use of this term).

B. Article 5(2) CAT: Application of the Vienna Convention on the Law of Treaties

The starting point for discussion is that Article 5 of the CAT, as with other treaties providing for extradite or prosecute obligations, does not expressly provide for “universal jurisdiction.”¹⁹⁵ As a general rule of treaty interpretation, the VCLT provides that a treaty shall

¹⁹¹ Belgium Memorial, *supra* note 79, at 50; Oral Proceedings, *supra* note 184, at 53.

¹⁹² Judgment, *supra* note 1, paras. 53-55.

¹⁹³ UN Doc A/69/10, *supra* note 12, paras. 145, 147; secretariat survey, *supra* note 30, para. 91.

¹⁹⁴ See UN Doc. A/C.6/71/SR.31, *supra* note 19.

¹⁹⁵ Arrest Warrant, *supra* note 2, para. 41 (Higgins et al., JJ., sep. op.), 5-15 (Guillaume, J., sep. op.); Yee, *supra* note 7, para. 21.

be interpreted in accordance with “the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹⁹⁶ The meaning of “context” for the purpose of treaty interpretation includes, in addition to the text, the instrument’s preamble.¹⁹⁷ The ICJ in the *Habré* case describes Article 5(2) as “universal jurisdiction” according to the supposed object and purpose of the CAT.¹⁹⁸ The phrase “object and purpose” is not defined by the VCLT and its meaning is vague and thus open to interpretation.¹⁹⁹ Nonetheless, in order to interpret the CAT’s object and purpose, one would reasonably expect the ICJ, which is at the heart of the international legal system, to have some regard to its “context.” The only extent to which the ICJ was prepared to consider context was to refer to a single and somewhat ambiguous preambular paragraph, which merely provides that states parties desire “to make more effective the struggle against torture.”²⁰⁰ It is solely from this preambular paragraph—and not by examining the instrument’s text—that the ICJ infers the CAT’s object and purpose. This would suggest that the ICJ does not, in fact, intend to interpret universal jurisdiction proper within the “ordinary meaning” of Article 5(2). To have done otherwise would perhaps place more weight on this preambular paragraph than it is capable of bearing.

The following sections provide a textual analysis of Articles 5 and 7 of the CAT and their *travaux préparatoires*, in accordance with the VCLT, in order to show that jurisdiction, even though it is capable of being interpreted broadly in Article 5(2), cannot be considered to include universal jurisdiction within its “ordinary meaning.” It further shows that the ICJ, by overlooking the text of Article 5, not only misinterprets the CAT’s “object and purpose,” but also the

¹⁹⁶ VCLT, *supra* note 110, Art. 31(1).

¹⁹⁷ *Id.*, Art. 31(2).

¹⁹⁸ Judgment, *supra* note 1, para. 74; *id.*, paras. 68, 86, 115.

¹⁹⁹ Isabelle Buffard & Karl Zemanek, *The “Object and Purpose” of a Treaty: An Enigma?*, 3 AUSTRIA REV. INT’L & EUR. L. 311 (1998).

²⁰⁰ *Supra* note 3, pmb. para. 6.

meaning of jurisdiction in Article 5(2) and the obligation to extradite or prosecute in Article 7, as the exclusive protection of a “common interest.”

C. Article 5 CAT: Textual Analysis

As with all treaties that use the Hague formula, the CAT, by virtue of Article 5(2), provides that “[e]ach State Party shall . . . take such measures as may be necessary to establish its jurisdiction over such offenses [referred to in Article 4] in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph I of this article.”²⁰¹ As can be seen, the wording in Article 5(2) defines the scope of a party’s obligation to “establish its jurisdiction” over relevant offenses. This is limited by express terms to “cases where the alleged offender is present in any territory under its jurisdiction” and the failure, for whatever reason, to “extradite him . . . to any of the States mentioned” in Article 5(1). The “presence” of the accused in a state party’s territory is relevant for triggering the obligation to enforce jurisdiction and implement the extradite or prosecute obligation under Article 7 of the CAT. Therefore, a Custodial State must provide for prescriptive jurisdiction that is sufficiently broad to cover crimes committed by foreign nationals abroad that have a link with Paragraph 1 States and where the accused is not extradited to them, as envisaged by the text of Article 5(2) referred to above.

Notably, the ICJ in the *Habré* case focuses exclusively on the “presence” of the accused and gives no consideration to the meaning of the words “does not extradite him . . . to any of the States mentioned in paragraph I of this article.”²⁰² Evidently, the meaning of Article 5(2) should not be read in isolation from the “States mentioned” in Article 5(1). Yet the ICJ provides no

²⁰¹ *Supra* note 3 (emphasis added).

²⁰² Judgment, *supra* note 1, para. 74. See also Suleymane Guengueng, *supra* note 130, para. 9(5).

analysis of that paragraph. The only extent to which the ICJ has regard to Article 5(1) is in passing, towards the end of its judgment. The ICJ observes that the Custodial State “does indeed have the option of extraditing [the accused]” to a Paragraph 1 State, “*but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him.*”²⁰³ The above quoted passage raises two important issues. First, the “option” of extradition does not reflect the actual text of Article 5(2). It makes clear that extradition to a Paragraph 1 State is an obligation, and only if the Custodial State “does not extradite him” does it then have an obligation to undertake a prosecution. It follows that, unless a Paragraph 1 State has made out a *prima facie* case that it has jurisdiction by virtue of a link with the case in question, then a Custodial State is permitted, but certainly has no obligation, to extradite or prosecute. As will be explained in the discussion of Article 7 of the CAT, *infra*, this oversight led the ICJ to misinterpret the nature and meaning of the obligation to extradite or prosecute in finding that prosecution is an international obligation, while extradition is merely an “option.” Second, the condition that a Paragraph 1 State must have “jurisdiction in some capacity” before an alleged offender can be extradited would make little sense had the ICJ interpreted the CAT as providing for a principle of universal jurisdiction. In fact, Article 5(1) would be redundant.

D. Article 5(1) CAT: “*Special Link*” with Paragraph 1 States

Although the ICJ sidestepped discussion of Article 5(1), the importance of it justifies its quotation in full:

²⁰³ *Id.*, para. 120 (italics added).

[e]ach State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses referred to in article 4 in the following cases: (a) [w]hen the offenses are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State; (b) [w]hen the alleged offender is a national of that State; (c) [w]hen the victim is a national of that State if that State considers it appropriate.²⁰⁴

Article 5(1) thus sets out the circumstances in which states parties are required, and permitted in the case of subsection (c), to establish jurisdiction and request extradition over relevant offenses, by virtue of the territoriality, active nationality and—so-called by Belgium in the *Habré* case—“passive personality” principles of jurisdiction in customary international law.²⁰⁵ The text of Article 5(1) would suggest that the CAT’s object and purpose is to prevent impunity when an offense has important jurisdictional links, or—in the words of the UN Secretariat, “a special link”—with one or more states parties, namely where an offense has been committed on a party’s territory or by its nationals or against its nationals. Torture can, by definition, only be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”²⁰⁶ During the drafting of the CAT, some states were concerned with the protection of their own nationals from acts of torture committed by state officials abroad. The commission of such acts is injurious to the state itself, constituting an internationally wrongful act within the meaning of the rules of state responsibility and giving rise to a legal right of diplomatic protection.²⁰⁷ On the other hand, the requirement to establish jurisdiction over offenses committed against a state’s nationals abroad raised concerns

²⁰⁴ *Supra* note 3.

²⁰⁵ Judgment, *supra* note 1, para. 65.

²⁰⁶ *Supra* note 3, Arts. 1, 2(3) & 16(1).

²⁰⁷ A state responsible for injuring a foreign national is obliged to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act. This reparation may take the form of restitution, compensation or satisfaction, either singly or in combination. *See* Articles on State Responsibility, *supra* note 82, Arts. 28, 30-31 & 34-37; Draft Articles on Diplomatic Protection with Commentaries, [2006] 2 Y.B. INT’L L. COMM’N (pt. 2), 22-28.

for a number of delegations during the *travaux préparatoires* of Article 5, as such jurisdiction could be abused and would be impractical. It was therefore made optional.²⁰⁸ Based on the foregoing, it is therefore reasonable to suppose that torture committed against one of its own nationals implicates certain of that state's national vital interests, including its sovereignty, political independence and governmental functions, and that impunity is prevented to protect such interests in addition to the human rights of their own nationals.

E. Article 5(2) CAT: Prescriptive Link with Paragraph 1 States

Article 5(2) is undoubtedly broad and requires no prescriptive link to be evidenced between a Custodial State's jurisdiction and an offense committed abroad. However, the text in Article 5(2), when read as a whole and in conjunction with Article 5(1), leads to the conclusion that the scope of a Custodial State's jurisdiction is limited to crimes within the treaty regime of the CAT that have a meaningful link with one of the Paragraph 1 States.²⁰⁹ The wording of Article 5(2) presupposes that Paragraph 1 States would be able to exercise their jurisdiction over a relevant offense had the accused been extradited.²¹⁰ As will be explained, *infra*, the purpose of Article 5(2) is thus to place an obligation on a Custodial State to establish its jurisdiction on behalf of Paragraph 1 States in cases of non-extradition.²¹¹ The jurisdiction in Article 5(2), when viewed in its proper context, cannot be interpreted as impliedly embodying a principle of

²⁰⁸ Human Rights Commission, Summary prepared by the UN secretary-general, paras. 15, 17, 22, 70, 73, UN Doc. E/CN.4/1314 (Dec. 19, 1978); Commission on Human Rights, Report on the Thirty-Sixth Session, paras. 48-49, UN Doc. E/1980/13 (1980), UN Doc. E/CN.4/1408 (1980); Human Rights Commission, Working Group Report, UN Doc. E/CN.4/1367 (Mar. 5, 1980); Human Rights Commission, Working Group Report, UN Doc. E/CN.4/L.1576 (Mar. 6, 1981); Human Rights Commission, Report of the Thirty-Seventh Session, paras. 21-22, UN Doc. E/CN.4/1475 (1981); J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE. A TEXTBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 60 (1988).

²⁰⁹ See also Reydams, *supra* note 8, at 12-13.

²¹⁰ Article 5(2) "does not require any State to exercise jurisdiction, merely to establish it," secretariat survey, *supra* note 30, note 156.

²¹¹ Part V, notes 322-32.

universal jurisdiction within its “ordinary meaning.”²¹² To suggest otherwise does not sit neatly with a textual analysis of Article 5(2) as a whole, or when read in conjunction with Article 5(1). It may even be said to misconstrue the textual situation, as parts of the text in Article 5(2), as well as the text in Article 5(1), are made redundant.²¹³ It also places undue emphasis on the mere “presence” of the accused in a Custodial State’s territory, which is a precondition for the obligation to the exercise of jurisdiction in any given case.

The ICJ in the *Habré* case, by focusing on the mere “presence” of the accused in the wording of Article 5(2), leads the ICJ to remark, somewhat misleadingly, that a Custodial State has an obligation to prosecute acts of torture and prevent impunity on behalf of all other parties for the exclusive protection of a “common interest.”²¹⁴ This does not sit neatly with the textual analysis of Article 5, which shows that parties to the CAT—to quote the words of the ICJ—do have “interests of their own” in the prevention of impunity.²¹⁵ The reason why the ICJ considered only half of the text of Article 5(2) and did not examine jurisdiction in this article or its relationship with the jurisdictional provisions in Article 5(1) may be explained by the ICJ’s determination of the admissibility of Belgium’s claim (as a basis for bringing proceedings before the ICJ) based solely on its status as a party to the CAT.²¹⁶ The opinions appended to the ICJ’s judgment cast doubt on Belgium’s principal claim that it had the right to exercise jurisdiction under the Article 5(1)(c) of the CAT and its entitlement to request the extradition of *Habré* under

²¹² This finding is further supported by Article 7(1) of the CAT, *infra*. See also Judgment, *supra* note 1, paras. 36 (Sur, J., diss. op.); 30-39 (Abraham, J., sep. op.); Reydams, *supra* note 7, at 20-21; Reydams, *supra* note 8, at 13.

²¹³ The same point applies mutatis mutandis to Article 7(1) of the CAT, *infra*.

²¹⁴ Judgment, *supra* note 1, paras. 68, 74.

²¹⁵ *Id.*

²¹⁶ Part II, notes 82-98.

Article 7 of the CAT, as the victims were not Belgian nationals at the time the alleged offences occurred in Chad.²¹⁷

Even if jurisdictional links to Paragraph 1 States were not explicit in Article 5(1) of the CAT, jurisdiction arising out of the extradite or prosecute obligation in Article 5(2) is still not universal jurisdiction properly so called, as treaty obligation to exercise jurisdiction and the presence of the suspect are required.²¹⁸ Only when a treaty gives the parties thereto jurisdiction over crimes having no link with any of the parties to the treaty would universal jurisdiction be established.²¹⁹ During the preparatory work of the Institute of International Law for a resolution on universal jurisdiction, the same point was acknowledged by several of the Institute's eminent members and in the text of a draft resolution.²²⁰ However, this was omitted from the resolution ultimately adopted in 2005.²²¹ That Article 5(2) does not establish a principle of universal jurisdiction is further corroborated by the *travaux préparatoires*.

F. Article 5(2) CAT: Travaux Préparatoires

The VCLT provides for a supplementary means of interpretation, by having recourse to the preparatory work of the treaty, in order to confirm the meaning resulting from the textual analysis.²²² The only extent to which the ICJ is prepared to observe the *travaux préparatoires* of the CAT in the *Habré* case is to note, in passing, that Article 7(1) of the instrument is modelled on the Suppression of Unlawful Seizure of Aircraft Convention.²²³ This statement explains

²¹⁷ Judgment, *supra* note 1, paras. 8, 12 (Xue, J., diss. op.), 21, 31–32 (Judge Abraham, J., sep. op.). The tenuous link with Belgium at the time when the crimes occurred may explain why Belgium invoked jurisdiction under both Article 5(1) and (2) of the CAT during the proceedings of the *Habré* case and interpreted the latter as “universal jurisdiction.”

²¹⁸ Arrest Warrant, *supra* note 2, para. 9 (Guillaume, J., sep. op.); Yee, *supra* note 7, paras. 23–25.

²¹⁹ Yee, *id.*, para. 25.

²²⁰ Tomuschat, *supra* note 24, at 335, 386.

²²⁰ *Id.* at 270–71, 277 (Vicuna), 318–19 (Rozakis), 321 (Cassese), 328 (Lee); *also id.* at 363, 367.

²²¹ IIL *Supra* note 26.

²²² *Supra* note 110, Art. 32.

²²³ Judgment, *supra* note 1, para. 90.

nothing as to the nature and meaning of the extradite or prosecute obligation under Article 7(1) or whether Article 5(2) embodies a customary rule of jurisdiction, no less a principle of universal jurisdiction. As the ICJ does not undertake a textual analysis of Article 5 or examine the CAT's *travaux préparatoires*, the result is that the ICJ's reference to "universal jurisdiction" is, to quote the wording of Article 31 of the VCLT, left "ambiguous or obscure."²²⁴

The CAT's *travaux préparatoires* show that jurisdiction in Article 5(2) should not be interpreted as embodying a customary rule of universal jurisdiction.²²⁵ One of the most controversial issues debated during the CAT's drafting is the question of so-called "universal jurisdiction."²²⁶ A close reading of the debates within the Working Group, which was established by the Human Rights Commission for the purpose of drawing up a draft convention, reveals that the extradite or prosecute obligation had first been used in a draft convention proposed by Sweden.²²⁷ The Swedish Government, in submitting the draft to the Human Rights Commission, uses the term "principle of universality" as nothing more than a loose but convenient way to describe jurisdiction in the obligation to extradite or prosecute. The obligation is understood by the Swedish Government to correspond with provisions in a number of existing conventions against various acts of international terrorism.²²⁸ As pointed out by Professors Burgers and Danelius, the respective representatives of the Netherlands and Sweden to the Human Rights

²²⁴ *Supra* note 110.

²²⁵ For in-depth analysis of the *travaux préparatoires*, see BURGERS & DANIELIUS, *supra* note 208; ACHENE BOULBESBA, *THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT* (1999).

²²⁶ UN Doc. E/CN.4/1314, *supra* note 208; UN Doc. E/CN.4/1367, *supra* note 208; UN Doc. E/1980/13, UN Doc. E/CN.4/1408, *supra* note 208, paras. 50-53; UN Doc. E/CN.4/1475, *supra* note 208; UN Doc. E/CN.4/L.1576, *supra* note 208; Human Rights Commission, Working Group Report, paras. 22-36, UN Doc. E/CN.4/1982/L.40 (1982), reproduced in UN Doc. E/1982/12/Add.1 (1982); Human Rights Commission, Working Group Report, UN Doc. E/CN.4/1983/L.2 (Feb. 28, 1983); Human Rights Commission, Working Group Report, paras. 26-36, UN Doc. E/CN.4/1984/72 (1984).

²²⁷ Letter Dated 18 January 1978 from the Permanent Mission of Sweden to the UN Office at Geneva addressed to the Division of Human Rights, UN Doc. E/CN.4/1285 (Jan. 23, 1978).

²²⁸ BURGERS & DANIELIUS, *supra* note 208, at 35.

Commission and, respectively, the Working Group Chairman and the draftsmen of the first draft of the convention, Article 5(2) is, “with some simplification, called ‘universal jurisdiction.’”²²⁹ Nevertheless, the Working Group uses the Swedish draft as the basis of its work. The comments made by delegations participating in the Working Group, as well as the comments submitted by governments on the draft to the UN Secretary-General, illustrate that the nomenclature “universal jurisdiction” continues to be used in order to describe the extradite or prosecute obligation throughout the drafting of the CAT.²³⁰ Thus, it should be of little surprise that, in 1984, the Working Group Chairman reports that “[t]he inclusion of universal jurisdiction in the draft convention was no longer opposed by any delegation.”²³¹

To accept at face value the Working Group’s reference to “universal jurisdiction,” other than as a non-technical term used to describe the extradite or prosecute obligation, as have some (including Belgium in the *Habré* case),²³² risks attributing to Article 5(2) legal consequences that were not debated or intended.²³³ It would have made little sense for delegations during the CAT’s drafting to negotiate and set out in Article 5(1) three narrow grounds of jurisdiction, only for Article 5(2)—a subsidiary paragraph—to establish an all-encompassing, obligatory principle of universal jurisdiction.²³⁴ Had the drafters been convinced of the applicability of a principle of universal jurisdiction, then surely they would not have stressed such alternative grounds of

²²⁹ *Id.*

²³⁰ UN Doc. E/CN.4/1314, *supra* note 208. *See also* BOULBESBA, *supra* note 225, at 177-235.

²³¹ UN Doc. E/CN.4/1984/72, *supra* note 226, para. 26.

²³² Belgium Memorial, *supra* note 79, at 51; Pinochet (No. 3), *supra* note 114, at 111 (Lord Browne-Wilkinson); Christopher K. Hall, *The Duty of States Parties to the Convention against Torture to Provide Procedures Permitting Victims to Recover Reparations for Torture Committed Abroad*, 18 EUR. J. INT’L L. 921, 934 (2007); Langer, *supra* note 11, at 252.

²³³ *See also* Reydam, *supra* note 7, at 20.

²³⁴ *See also* Judgment, *supra* note 1, para. 29 (Abraham, J., sep. op.); I.C.J., Oral Proceedings, Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), para. 41 (Mar. 21, 2012); Certain Criminal Proceedings in France (Dem. Rep. Congo v. France), Provisional Measures, 2003 I.C.J. REP. 102 (Jun. 17) (De Cara, J., diss. op.); BOULBESBA, *supra* note 225, at 176, 204-05; David W. Bowett, *Jurisdiction: Changing Patterns of Authority over Activities and Resources*, 53 BRIT. Y.B. INT’L L. 1, 13 (1982); Higgins, *supra* note 7, at 99.

jurisdiction. This conclusion is supported for three further reasons. First, the existence and legality of universal jurisdiction in customary international law, as well as the implications raised by expanding such a rule to include crimes proscribed in treaties, was not examined by the Working Group. This is corroborated by an explanatory memorandum on the ratification of the CAT presented during the 1986-1987 Session of the Dutch Parliament. In this memorandum, the Ministers of Justice and of Foreign Affairs of the Netherlands declared that the “very severe offenses” proscribed in the CAT “could not in themselves justify the application of the principle of universal jurisdiction to such offenses. Repression of these violations should be left to the States that had a tie with the person or the place where the crime was committed.”²³⁵ This declaration is all the more significant in that the Netherlands’ representative had been Chairman of the Working Group and one of the instrument’s draftsmen. Second, it is unlikely that the Working Group intended to codify a principle of jurisdiction whose meaning and definition, then as now, are controversial and little understood. Lastly, a number of states that participated in the drafting of Article 5(2) have subsequently confirmed that it was not intended to codify a principle of universal jurisdiction.²³⁶

On closer analysis, the reason why jurisdiction in the extradite or prosecute obligation is described as “universal jurisdiction” during the CAT’s drafting is because of an over-simplistic analogy between the absence of an express jurisdictional link in Article 5(2) and the belief of the existence of a historical customary rule of universal jurisdiction over piracy. The US delegation goes so far as to expressly state that torture is “like” piracy in order to justify the description “of

²³⁵ ICRC, *Jurisdiction over War Crimes* (The Netherlands) (2016), at www.icrc.org/customary-ihl/eng/docs/v2_cou_nl_rule157.

²³⁶ Note submitted to Office of Legal Affairs (UK) (Apr. 15, 2011), at www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/UK&Northern%20Ireland.pdf; Note submitted to Office of Legal Affairs (China), 3-4, 8-10 (2010), at www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/China_E.pdf.

an obligation to prosecute or extradite” as “universal jurisdiction.”²³⁷ It is worth noting that, prior to the drafting of the CAT, extradite or prosecute obligations had come to be loosely referred to as “universal jurisdiction” during the negotiation of other treaties based on the same piracy analogy.²³⁸ This issue becomes of great importance when one considers that the same analogy has been repeated, once again, during the work on universal jurisdiction at the Sixth Committee.²³⁹

G. Textual Analysis of Article 7(1) CAT Supports Prosecution on Behalf of Paragraph 1 States

1. Prosecution Arises Failing Extradition to Paragraph 1 States

The interpretation of Article 5(2) of the CAT as placing an obligation on a Custodial State to establish its jurisdiction on behalf of Paragraph 1 States in cases of non-extradition, rather than establishing universal jurisdiction, is further supported by analysis of the text and *travaux préparatoires* of Article 7 of the CAT. Article 7 provides for the extradite or prosecute obligation. The *travaux préparatoires* make clear that Articles 5(2) and 7 have to be read together because of their complementary nature.²⁴⁰ Article 7(1) reaffirms the Custodial State’s duty to submit a case for prosecution “if it does not extradite him” to any of the states “contemplated in article 5.” This wording in Article 7(1) is not examined by the ICJ in the *Habré* case. The same point applies *mutatis mutandis* to Article 6(4), which provides that the Custodial State “shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention.” It immediately proceeds to note that “[t]he State which makes the preliminary inquiry contemplated in

²³⁷ UN Doc. E/CN.4/1314, *supra* note 208, paras. 15, 69.

²³⁸ Arrest Warrant, *supra* note 2, paras. 25-39 (Higgins et al., JJ., joint sep. op.). See also [1972] 1 Y.B. INT’L L. COMM’N, 7, 11-12, 17, 190, 193; [1972] 2 Y.B. INT’L L. COMM’N, 316.

²³⁹ E.g., secretary-general report (2010), *supra* note 18, para. 27; UN secretary-general report, The Scope and Application of the Principle of Universal Jurisdiction, para. 13, UN Doc. A/69/174 (2014); secretary-general report (2015), *supra* note 15, paras. 55, 82.

²⁴⁰ UN Doc. E/CN.4/1982/L.40, *supra* note 226, at 5; BURGERS & DANIELIUS, *supra* note 208, at 63, 72.

paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.” This would suggest that Paragraph 1 States have the right, upon being notified, to request extradition of the alleged offender, after the Custodial State has undertaken a “preliminary inquiry” but has not yet “exercised jurisdiction.”²⁴¹ The failure by the Custodial State to extradite the accused to a Paragraph 1 State, for whatever reason, then has a duty to exercise its jurisdiction and prosecute on their behalf.²⁴² In a similar vein, Article 7(2) seeks to further safeguard the interests of Paragraph 1 States in the event of non-extradition. It provides that, in cases where states parties are operating on the basis of Article 5(2), the evidence required for prosecution “shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.” As indicated by the *travaux préparatoires*, Article 7(2) was included due to the official status of the alleged offenders and the risk of “trials on the basis of spurious accusations inspired by political motives.”²⁴³

2. Absence of a Prior Extradition Request by Paragraph 1 States Does Not Imply Universal Jurisdiction

One of the issues raised during the drafting of Article 5(2) was the circumstances in which a Custodial State would have an obligation under Article 7 to prosecute on behalf of a Paragraph 1 State. One delegation proposed to add the words “after receiving a request for extradition,” after the words “and it does not extradite him,” the purpose of which was to limit the Custodial State’s obligation to establish its jurisdiction after receiving an extradition request

²⁴¹ As noted, *supra* note 210, Article 5(2) requires states to merely “establish” their jurisdiction but not to “exercise” it.

²⁴² Judgment, *supra* note 1, para. 81.

²⁴³ BURGERS & DANIELIUS, *supra* note 208, at 79.

by a Paragraph 1 State.²⁴⁴ Other delegations opposed the proposed amendment, as it could facilitate the creation of loopholes.²⁴⁵

Treaties which do not make the obligation to prosecute conditional upon refusal of a prior request for extradition, such as the CAT, implies that states are required to exercise universal jurisdiction over the offenses covered by these conventions.²⁴⁶ This view also seems to be shared by the ICJ in the *Habre* case when it suggests, *obiter dictum*, that the “obligation to establish universal jurisdiction” under Article 5(2) is a “necessary condition” for fulfilling the obligation to submit the case to its authorities for prosecution under Article 7(1).²⁴⁷ As will be explained, *infra*, the establishment of jurisdiction in Article 5(2) is necessary for fulfilling the obligation to initiate criminal proceedings under Article 7, failing extradition to a Paragraph 1 State, but this does not automatically imply that it is “universal jurisdiction”. However, the ICJ goes one step further and interprets the “nature and meaning” of the extradite or prosecute obligation under Article 7(1) in the following way.

In the ICJ’s opinion the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.²⁴⁸

In coming to the above finding, the ICJ reasons that only if the Custodial State has “received a request for extradition in any of the cases envisaged in the provisions of the

²⁴⁴ UN Doc. E/CN.4/1367, *supra* note 208, at 9; UN Doc. E/1980/13 (1980), UN Doc. E/CN.4/1408, *supra* note 208, at 59; E/CN.4/1475, *supra* note 208, at 57; UN Doc. E/CN.4/L.1576, *supra* note 208, at 25.

²⁴⁵ *Id.*

²⁴⁶ This interpretation of extradite or prosecute obligations is shared by Belgium; *see* UN Doc. A/CN.4/612, *supra* note 171, para. 22. *See also* Suleymane Guengueng, *supra* note 130, para. 9(7).

²⁴⁷ Judgment, *supra* note 1, para. 74.

²⁴⁸ *Id.*, para. 95.

Convention [under Article 5(1)], it can relieve itself of its obligation to prosecute by acceding to that request.”²⁴⁹ In reaching this finding, the ICJ seems to impliedly follow the earlier decision of the Committee Against Torture in the *Habré* case.²⁵⁰

With respect, the ICJ is incorrect in its approach to interpreting the “nature and meaning” of the extradite or prosecute obligation, which gives the impression that the Custodial State has a positive and absolute obligation under the CAT to prosecute any act of torture, which exists *ipso facto* and arises as soon as the suspect is present in its territory, regardless of any request for extradition by a Paragraph 1 State. Conversely, only when such a request is made (if a request is made at all) does the Custodial State have discretion to choose the option of an alternative course, namely extradition of the alleged offender to a Paragraph 1 State. According to the ICJ, interpreting the obligation to prosecute in Article 7(1) in this way is “intended to allow the fulfilment of the Convention’s object and purpose.”²⁵¹ The ICJ thus interprets the nature and meaning of Article 7(1) in the same way as jurisdiction in Article 5(2) of the CAT, namely the protection of a “common interest” and not the interests of particular states parties.²⁵² It will be recalled that the ICJ interprets the CAT’s object and purpose this way in order to preserve the admissibility of Belgium’s claim and according to a single preambular paragraph.

The absolute “obligation” to prosecute and “option” of extradition do not reflect the actual text of Articles 5(2) and 7(1). The *travaux préparatoires* indicate that the absence of an extradition request was a compromise intended to place the burden on the Custodial State to

²⁴⁹ *Id.*

²⁵⁰ Suleymane Guengueng, *supra* note 130, para. 9.7. In this case, Senegal argued that there would be an obligation to prosecute under Article 7 of the CAT only after an extradition request had been made and refused, which the Committee rejected. The UN Secretariat also suggests that, on the basis of this decision, it may be argued that treaties utilizing the Hague formula give rise to an obligation to prosecute *ipso facto* independently from any request for extradition, secretariat survey, *supra* note 30, paras.127-31.

²⁵¹ Judgment, *supra* note 1, para. 115.

²⁵² Part II, notes 87-98.

offer extradition, rather than on a Paragraph 1 State to request extradition, thus making more effective the ability of the latter to obtain the whereabouts and custody of an accused seeking refuge overseas. It is for this reason that Article 5(2) makes the Custodial State's duty "to establish its jurisdiction" conditional upon the failure to extradite to a Paragraph 1 State. Only after a Custodial State has "immediately notified" a Paragraph 1 State of an alleged offender's presence in its territory, in accordance with Article 6, and the Custodial State subsequently fails, for whatever reason, to extradite the suspect to a Paragraph 1 State, does an obligation arise to submit the case for prosecution under Article 7(1). It follows that unless one of the parties "contemplated in Article 5" and having a jurisdictional link with an offense makes an extradition request (upon being notified by a Custodial State of his presence and the charges against him), then there is no international obligation for a Custodial State to actually exercise its jurisdiction under Article 5(2) and prosecute an alleged offender under Article 7(1). The ICJ glosses over the actual wording of these provisions.

Only by viewing parts of the text of Article 5(2) selectively and in isolation, as well as overlooking the relationship between that text and Articles 5(1), 6(4) and 7, can the ICJ's interpretation of the obligation to extradite or prosecute be maintained. A textual analysis of Articles 5 and 7 of the CAT leads to the following propositions. First, extradition and prosecution are both international obligations under the CAT and, contrary to the ICJ, the obligation to prosecute only arises when the obligation to extradite to a Paragraph 1 State is not fulfilled. Second, the nature and meaning of the obligation to extradite or prosecute is not exclusively to protect a "common interest." Rather, it is to enable Paragraph 1 States to obtain the custody of the accused, or have such persons prosecuted on their behalf, failing extradition.

In sum, the analysis of the text and *travaux préparatoires* of Articles 5 and 7 of the CAT points to the conclusion that the principle of universal jurisdiction does not fall within the CAT's scope. Of course, treaties are living instruments and they may, through subsequent state practice, change to include universal jurisdiction.²⁵³ However, for reasons spelled out in the following section, there is insufficiently general and widespread practice to suggest a different outcome. The conditions attached to jurisdiction in Article 5(2) of the CAT and numerous other treaties that use extradite or prosecute obligations would suggest that it should be called something else other than "universal jurisdiction."²⁵⁴ The ordinary meaning of jurisdiction in Article 5(2), based on the above textual analysis, is capable of an alternative interpretation, namely a form of "treaty-based jurisdiction."²⁵⁵

H. *Universal Jurisdiction's Existence in Customary International Law at Present: False Analogies*

There is a further reason why jurisdiction in treaty obligations to extradite or prosecute should not be interpreted to imply or mandate universal jurisdiction: as a prerequisite, this interpretation is dependent upon the presumed existence of a customary rule of universal jurisdiction and its applicability over a broad range of crimes for the exercise of universal jurisdiction in implementing treaty obligations to extradite or prosecute. And yet, the assumption that universal jurisdiction has a long and honorable past is based on the prevailing narrative, which developed prior to the *Habré* case, and amounts to a misreading of history.²⁵⁶ On closer analysis, universal jurisdiction is based on false foundations in customary international law and has developed—out of scholarship rather than state practice—as a hollow concept.²⁵⁷

²⁵³ *Supra* note 110.

²⁵⁴ Reydam, *supra* note 8, at 7, 16.

²⁵⁵ Part V, notes 285-309.

²⁵⁶ Part I, notes 46-57.

²⁵⁷ *Id.*

1. Domestic Prosecutions for International Crimes

An empirical analysis of actual state practice (legislation of 78 states and actual trials purported to involve universal jurisdiction in domestic courts with respect to international crimes) reveals that universal jurisdiction remains a hollow concept without state practice to the present day.²⁵⁸ The survey was conducted in the period between the *Eichmann* trial in 1961 - a trial widely cited by scholars as the most important historical example of universal jurisdiction - to 2016.²⁵⁹ The findings of this survey are presented in table 1.

TABLE 1. International Crimes Prosecutions

Prosecuting state	Number of trials	Nationality and number of suspects
Austria	1	Former Yugoslav (1)
Belgium	4	Rwandan (8)
Canada	2	Former Nazi (1) Rwandan (1)
Denmark	1	Former Yugoslav (1)
France	5	Former Nazi (1) Mauritanian (1) Tunisian (1) Rwandan (3)
Germany	6	Former Nazi (1) Former Yugoslav (4) Rwandan (2)
Israel	1	Former Nazi (1)
The Netherlands	6	Afghans (3) Congolese (1)

²⁵⁸ These states are as follows: Algeria, Argentina, Australia, Austria, Bahamas, Bahrain, Bangladesh, Belarus, Belgium, Brazil, Bulgaria, Canada, China, Costa Rica, Cuba, Cyprus, Czech Republic, Denmark, DRC, Egypt, El Salvador, Finland, France, Germany, Ghana, Greece, Guatemala, India, Indonesia, Iran, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Kazakhstan, Kuwait, Lebanon, Libya, Liechtenstein, Malawi, Malaysia, Mauritius, Mexico, Morocco, New Zealand, Nigeria, Norway, Peru, Poland, Qatar, Republic of Korea, Russia, Slovakia, Senegal, Seychelles, Singapore, Spain, Slovenia, Swaziland, Saudi Arabia, South Africa, Sri Lanka, Sudan, Sweden, Switzerland, Tanzania, Thailand, The Netherlands, Tunisia, Turkey, UAE, Ukraine, Uganda, UK, US, Vietnam, Zambia.

²⁵⁹ The survey was undertaken by the present author by examining a range of sources, including: UN General Assembly and its Sixth Committee documents during the work on universal jurisdiction; LEXIS-NEXIS and Westlaw; specialized journals, Web sites, such as legislationonline, the Hague Justice Portal; NGO reports, such as Amnesty International, Human Rights Watch, Redress and Trial Watch; newspaper articles and other media documents; and the Google search engine. The survey was compiled as of May 2016.

		Rwandan (2)
		Surinamese (1)
Norway	1	Former Yugoslav (1)
Spain	1	Argentinian (1)
Switzerland	2	Former Yugoslav (1)
		Rwandan (1)
Senegal	1	Chadian (1)
U.K.	3	Former Nazi (1)
		Afghan (1)
		Nepalese (1)
Total		
13 states	34	

The results of this empirical research, as table 1 shows, is a total of 34 trials in 13 states.²⁶⁰ On the basis of table 1, it is possible to identify a typology of three situations in which states undertake prosecutions on the basis of extraterritorial jurisdiction: (i) World War II (5 trials); (ii) treaty obligations to extradite or prosecute (10 trials); and (iii) internal armed conflicts in the territories of the Former Yugoslavia and Rwanda (19 trials). All of these situations actually involve the implementation of different types of treaty-based jurisdiction, in which there are sufficiently close connections to the prosecuting state or to one of its treaty partners, and are not examples of universal jurisdiction.²⁶¹ In a similar vein, national laws, enacted to give effect to these treaty regimes, provide for treaty-based rather than universal jurisdiction.²⁶² The work on universal jurisdiction at the Sixth Committee reveals that most states accept the existence of a customary rule of universal jurisdiction in their *opinio juris* and verbal practice. However, with the exception of piracy on the high seas, much of this is far from uniform and, on closer analysis, is really support for treaty-based types of jurisdiction.²⁶³ Evidence of actual state practice in

²⁶⁰ The term “former Nazi” is used to denote the fact that suspects were prosecuted for alleged crimes committed in the context of World War II on behalf of the Nazi regime.

²⁶¹ See Part V, notes 336-409, for case studies illustrating these different types of treaty-based jurisdiction.

²⁶² This includes national laws implementing the Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 UNTS 3) (“ICC Statute”), which establishes a mandatory treaty regime of extradition if there is a failure to prosecute an alleged offender present in a state party’s territory, pursuant to the principle of complementarity.

²⁶³ Part V, notes 338-411.

support of universal jurisdiction proper in customary international law is nonexistent.²⁶⁴ This would suggest that the status of universal jurisdiction in customary international law, at present, is uncertain and controversial. Therefore, the idea that extradite or prosecute obligations can be read as impliedly embodying or mandating the use of universal jurisdiction because it is well established in customary international law, regardless of the actual treaty text, is premised on false analogies.²⁶⁵

2. Existing Studies Confuse Treaty-Based Jurisdiction as “Universal Jurisdiction”

The trials in table 1 are often claimed by scholars and NGOs (and some governments and courts) to be based on universal jurisdiction.²⁶⁶ For example, to date the most comprehensive survey of state practice with respect to assertions of extraterritorial jurisdiction for the prosecution of international crimes has been undertaken by Professor Langer.²⁶⁷ Although Professor Langer does not identify any practice additional to that in table 1; all of these trials are categorized as examples of universal jurisdiction.²⁶⁸ Professor Langer does not examine examples of state practice in any detail, or their significance for establishing customary international law over particular crimes. Moreover, Professor Langer acknowledges the weakness of the argument that treaty obligations to extradite or prosecute provide a basis for

²⁶⁴ Notably, during proceedings in the *Habré* case, in response to a question put by Judge Greenwood, Belgium endeavored to show that a customary rule of universal jurisdiction exists over war crimes, crimes against humanity and genocide. This is of great importance because states rarely attempt to explain themselves by evidencing the existence of customary rules. To quote the words of Judge Abraham, Belgium “fell far short of doing so.” See Reply of Belgium to Judge Greenwood, Questions Relating to the Obligation to Prosecute or Extradite (Mar. 28, 2012); Judgement, *supra* note 1, para. 33 (Abraham, J., sep. op).

²⁶⁵ Reydam, *supra* note 8, at 7-8.

²⁶⁶ E.g., Dicker, *supra* note 129, at 235; Kaleck, *supra* note 116, at 958; Wolfgang Kaleck, *Remarks*, 102 AM. SOC’Y INT’L PROC. 397, 402 (2008); Eugene Kontorovich and Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AJIL 436 (2010); Langer, *supra* note 50, at 7-9; Nanda, *supra* note 116, at 398-400; Beth Van Schaack & Zarco Perovic, The Prevalence of “Present-In” Jurisdiction, 107 AM. SOC’Y INT’L PROC. 233, 241 (2013); Peter Weiss, *UNIVERSAL JURISDICTION: PAST, PRESENT AND FUTURE*, 107 AM. SOC’Y INT’L PROC. 233, 407-08 (2013).

²⁶⁷ See also Van Schaack & Perovic, *id.* at 237.

²⁶⁸ Langer, *supra* note 50.

universal jurisdiction and that the Rome Statute of the ICC does not authorize universal jurisdiction either.²⁶⁹ Nevertheless, Professor Langer clearly adopts universal jurisdiction's prevailing narrative²⁷⁰ and therefore all national laws and trials pursuant to such treaties are counted as examples of universal jurisdiction, even though the states concerned may not share the same view.²⁷¹ This leads Professor Langer to suggest that many states have passed universal jurisdiction statutes and that such jurisdiction has been used to prosecute international crimes, including genocide, crimes against humanity, war crimes, and torture, for the past several decades.²⁷² A similar claim has been made in a major survey of state practice by Amnesty International,²⁷³ prepared for the purpose of informing Sixth Committee discussions on universal jurisdiction, on which Langer partly relies.²⁷⁴ The Amnesty survey counts states as having automatically provided for universal jurisdiction legislation if the state has implemented treaty obligations to extradite or prosecute (which according to Amnesty provide for an "express" obligation to exercise universal jurisdiction), but also treaties that do not provide for such obligations, such as the Genocide Convention and the Rome Statute of the ICC (which provide for an "implied" obligation to exercise universal jurisdiction).²⁷⁵ This leads Amnesty to conclude that 147 out of 193 states "have provided for universal jurisdiction" over one or more international crimes, while a total of 91 states have provided for such jurisdiction "over ordinary crimes, even when the conduct does not involve conduct amounting to a crime under

²⁶⁹ *Id.* at 4 & note 281.

²⁷⁰ Part I, notes 50-57.

²⁷¹ *Id.* at 4, 15, 25 (e.g., Note submitted to the Office of Legal Affairs (UK), *supra* note 236).

²⁷² *See also* Langer, *supra* note 11.

²⁷³ *Supra* note 17.

²⁷⁴ Langer, *supra* note 50, nn.2, 21.

²⁷⁵ *Supra* note 8, at 9.

international law.”²⁷⁶ Moreover, since World War II, prosecutions based on universal jurisdiction have been instituted in 6 states additional to those in table 1.²⁷⁷

3. State Practice Does Not Evidence Universal Jurisdiction in Custom or Prove Treaty Support for Universal Jurisdiction

Problematically, such studies risk creating an inaccurate empirical picture because the degree of state practice in support of universal jurisdiction (and its importance as a tool for preventing impunity) are overstated.²⁷⁸ It also leads to such claims that universal jurisdiction is exercised almost exclusively by European and Western nations in respect of international crimes;²⁷⁹ universal jurisdiction is “alive and well” in customary international law²⁸⁰ and “widely exercised in many countries”;²⁸¹ and that over 100 states provide for universal jurisdiction in their legislation, including in the implementation of treaty obligations to extradite or prosecute, which proves that such treaties support universal jurisdiction’s existence.²⁸² However, this is incorrect because in each of the cases identified in table 1, a “clear and objective link existed with the forum state” and none of them provide proper examples of universal jurisdiction.²⁸³ That is to say, despite the *opinio juris* and verbal practice of all 13 states in table 1 being in favor of universal jurisdiction, the prosecution of international crimes on the basis of universal jurisdiction *stricto sensu* has turned out to be non-existent. Put differently, the actual practice of

²⁷⁶ *Id.* at 12. It further finds that an additional 16 states “can exercise universal jurisdiction over conduct amounting to a crime under international law, but only as an ordinary crime [as defined in the state’s domestic law],” *id.*

²⁷⁷ *Id.* at 10.

²⁷⁸ Reydam, *supra* note 8, at 13-16; Ryan Goodman, *Counting Universal Jurisdiction State’s: What’s Wrong with Amnesty International’s Numbers* (Dec. 13, 2013), at <https://www.justsecurity.org/4581/amnesty-international-universal-jurisdiction-preliminary-survey-legislation-world/>; Van Schaack & Perovic, *supra* note 266, at 238-39.

²⁷⁹ Kontorovich & Art, *supra* note 266, at 437, 453. *See also* Nanda, *supra* note 116, Van Schaack & Perovic, *id.* at 241.

²⁸⁰ Nanda, *id.* at 401.

²⁸¹ Kaleck, *supra* note 266, at 402.

²⁸² Nanda, *supra* note 116, at 398; Christopher K. Hall, *Remarks*, 102 AM. SOC’Y INT’L PROC. 397, 401 (2008). *See also* Dicker, *supra* note 129, at 233; RESTATEMENT (FOURTH), *supra* note 11, Reporters’ Note 2.

²⁸³ Reydam, *supra* note 8, at 14-16. *See also* Yee *supra* note 7, paras. 30-31, 42; UN Doc. A/C.6/70/SR.12, *supra* note 17, para. 109 (China). *See also* Van Schaack & Perovic, *supra* note 266, at 240.

these states shows that at no time has a state been willing to act as an “agent of the international community” and prosecute any crime committed anywhere in the world, whoever their authors and victims, for the exclusive protection of international community values. On the contrary, the data reveals that states (including those states invoking “universal jurisdiction”) only undertake prosecutions when jurisdiction has a treaty basis and they have a sufficiently close link with the crime in question. It is the meaning of treaty-based jurisdiction to which this article will now turn.

V. TREATY JURISDICTION IS THE ACTUAL BASIS OF JURISDICTION

This final Part argues that only treaty-based jurisdiction exists in the CAT and other treaties creating extradite or prosecute obligations and analyzes key case studies, based on the empirical findings in table 1, in order to show that common examples of universal jurisdiction state practice are actually better explained as different types of treaty-based jurisdiction. It also proposes a definition of treaty-based jurisdiction and explains its underlying rationale, in order to show the difference between this type of jurisdiction and universal jurisdiction.

A. Only Treaty-Based Jurisdiction Exists in Extradite or Prosecute Obligations

The jurisdiction implementing the extradite or prosecute obligation in Article 5(2) of the CAT, as with all other treaties providing for such regimes, does not expressly require proof of a link between a Custodial State and an offense committed by a foreign national abroad (other than the presence of the accused and treaty obligation to exercise jurisdiction). This lack of required proof is not because it establishes a principle of universal jurisdiction but because the CAT does not, in fact, contain a principle of jurisdiction in customary international law at all. The territoriality and nationality principles have long been regarded as primary grounds of

jurisdiction in international law.²⁸⁴ The pre-eminence of territoriality and nationality jurisdiction is reflected in the CAT's provisions and numerous other treaties that use the Hague formula, both of which are mandatory, and are used in parallel to extradite or prosecute provisions.²⁸⁵

In the CAT, the furthest some states were prepared to accept jurisdiction over a relevant offense committed by a foreign national abroad is, by virtue of Article 5(1)(c), when the victim is a state's national.²⁸⁶ This jurisdiction is voluntary and not obligatory. In other treaties, many adopted in response to international terrorism, states have been prepared to provide the same type of jurisdiction, on a voluntary basis, over particular serious offenses committed by foreign nationals abroad where it is necessary to protect their own vital national interests.²⁸⁷ Offenses committed against or implicating the state's sovereignty, political independence, national security and governmental functions;²⁸⁸ diplomatic personnel and any other person who enjoys status as an internationally protected person and exercises functions on behalf of that state;²⁸⁹ embassies, diplomatic and consular premises and government facilities;²⁹⁰ nationals;²⁹¹ and registered and government operated flag vessels and aircraft could fall in this category.²⁹²

²⁸⁴ *Lotus*, *supra* note 20; Arrest Warrant, *supra* note 2, para. 4 (Guillaume, J., sep. op.).

²⁸⁵ *Supra* note 3, Art. 5(1)(a) & (b). For a list of treaties providing for mandatory territoriality and nationality jurisdiction, *see* secretariat survey, *supra* note 30, para. 112.

²⁸⁶ As discussed, *supra* notes 206-07, such crimes are also injurious to the state of nationality

²⁸⁷ For a list of treaties providing for extraterritorial jurisdiction on a voluntary basis, *see* secretariat survey, *supra* note 30, para. 112.

²⁸⁸ *E.g.*, International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 UNTS 205, Art. 5(1)(c) ("Hostages Convention"); Terrorist Bombings Convention, *supra* note 16, Art. 6(2)(d); Financing Convention, *supra* note 34, Art. 7(2)(a) & (c); International Convention for the Suppression of Acts of Nuclear Terrorism, Apr. 13, 2005, 2445 UNTS 89, Art. 9(2)(d) ("Nuclear Convention").

²⁸⁹ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1035 UNTS 167, Art. 3(1)(c), Dec. 14, 1973.

²⁹⁰ Terrorist Bombings Convention, *supra* note 16, Art. 6(2)(b); Financing Convention, *supra* note 34, Art. 7(2)(b); Nuclear Convention, *supra* note 288, Art. 9(2)(b).

²⁹¹ *E.g.*, Hostages Convention, *supra* note 288, Art. 5(1)(d); Terrorist Bombings Convention, *id.* Art. 6(2)(a); Financing Convention, *id.* Art. 7(2)(a); Nuclear Convention, *id.* Art. 9(2)(a);

²⁹² *E.g.*, Seizure of Aircraft Convention, *supra* note 32, Art. 4(1)(a); Financing Convention, *id.* Art. 7(2)(e); Nuclear Convention, *id.* Art. 9(2)(e).

Based on the foregoing and the textual analysis in Part IV, the jurisdiction arising out of extradite or prosecute obligations may be better understood as a type of treaty-based jurisdiction. The interpretation offered here has received some judicial sanction by Judges Higgins et al. in the *Arrest Warrant*.²⁹³ The judges in that case study the provisions of certain important treaties (including the CAT), the adoption of which, they observe, is asserted in existing scholarship to “evidence universality as a ground for the exercise of jurisdiction recognized in international law.” They conclude that such treaties do not, in fact, provide for universal jurisdiction.²⁹⁴ The judges explain that the parties to these treaties agree to grounds of jurisdiction providing important links with the prescribing state. In addition to these grounds of jurisdiction, there are “parallel provisions whereby a State party in whose jurisdiction the alleged perpetrator of such offenses is found shall prosecute him or extradite him.”²⁹⁵

The “parallel provisions” referred to in the passage quoted above is jurisdiction arising out of treaty obligations to extradite or prosecute. According to the judges, “[b]y the loose use of language the latter has come to be referred to as ‘universal jurisdiction’, though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.”²⁹⁶ While the judges were right to suggest that such jurisdiction has been “inaccurately termed” as a principle of “universal jurisdiction,” they referred to this treaty-based jurisdiction as “obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.”²⁹⁷ It is somewhat misleading to conceptualize this jurisdiction as “territorial jurisdiction.”²⁹⁸ It is not possible to found this extraterritorial prescriptive jurisdiction on the principle of territoriality

²⁹³ *Supra* note 2 (Higgins et al., JJ., joint sep. op.). *See also* Yousef, *supra* note 6.

²⁹⁴ *Id.*, paras. 25-26, 41. The same conclusion is reached by Judge Guillaume, *id.*, paras. 7-15.

²⁹⁵ *Id.*, para. 41.

²⁹⁶ *Id.*

²⁹⁷ *Id.*, paras. 41-42, 44. *See also* Yee, *supra* note 7, para. 8.

²⁹⁸ O’Keefe, *supra* note 25, at 742, 755.

simply because the alleged offender subsequently enters the territory of the prescribing state.²⁹⁹

As discussed above, the presence of the accused triggers the Custodial State's obligation to enforce its jurisdiction and to extradite or prosecute. The enforcement of jurisdiction, which is strictly territorial, is distinct from jurisdiction to prescribe, which is extraterritorial.³⁰⁰ Only by the use of legal fiction would the "obligatory territorial jurisdiction" described by the judges perhaps make sense.

The above interpretation of treaty-based jurisdiction has also found some support in scholarship.³⁰¹ Professor Yee highlights the difficulty of evaluating jurisdiction in treaties containing extradite or prosecute obligations due to "[o]ver-exaggerated statements expressing support for universal jurisdiction" in existing scholarship and "the controversy surrounding what constitutes universal jurisdiction, properly so called."³⁰² Having undertaken a careful examination of treaty practice, Professor Yee argues that there is no support for the claim that such treaties embody the existence of universal jurisdiction.³⁰³ This is because treaties either require that crimes have links to some parties to a particular treaty regime (as in the case of treaties that use the Hague formula, such as the CAT) or else a treaty permission or obligation to exercise jurisdiction and the presence of the suspect are required (such as the 1949 Geneva Conventions).³⁰⁴ For Professor Yee, neither of these situations arising out of treaty practice can be properly called "universal jurisdiction."³⁰⁵ The latter is based solely on the "universal concern" over the crime, such that every state in the world has an interest in prosecuting the

²⁹⁹ *Id.*

³⁰⁰ UN Doc. A/61/10, *supra* note 20, para. 9.

³⁰¹ Higgins, *supra* note 7, at 99; Reydams, *supra* note 7, at 14-21. *See also* UN Doc. A/CN.4/690, *supra* note 6, paras. 109-16.

³⁰² Yee, *supra* note 7, paras. 14-15.

³⁰³ *Id.*, para. 17.

³⁰⁴ *Id.*, paras. 15-28.

³⁰⁵ *Id.*, paras. 8, 28.

perpetrator, and the absence of any jurisdictional link between the prosecuting state and the crime at issue.³⁰⁶

This leaves open the question the type of jurisdiction used to implement extradite or prosecute obligations. According to Professor Yee, extradite or prosecute is a “means of exercising jurisdiction; it is not jurisdiction itself.”³⁰⁷ For Professor Yee, the obligation does not necessarily lead to the finding of a particular ground of jurisdiction itself and may lead to the utilization of “all the possible kinds.”³⁰⁸ Therefore, the “pivotal point” is to identify which type of jurisdiction (existing in customary international law and stipulated by the relevant treaty regime) the obligation is used to implement, such as territoriality, nationality or protection of national vital interests.³⁰⁹ The present article departs from Professor Yee and, as will be explained, the treaty-based jurisdiction arising out of extradite or prosecute obligations exists independently and may be distinguished from principles of jurisdiction in customary international law in important ways.

B. Treaty-Based Jurisdiction: Defining the Basic Concept

Treaty-based jurisdiction, it is proposed, may be defined as the permission under international law to establish jurisdiction over a relevant treaty-offense committed abroad, including by the nationals of another party to the treaty regime, in the absence of any other lawfully accepted jurisdictional link to the prescribing state at the time of the relevant conduct. As treaty-based jurisdiction implements extradite or prosecute obligations, many treaties, including treaties utilizing the Hague formula, do not require proof of a special jurisdictional link between the relevant offense and the prescribing state. Accordingly, national legislation, enacted

³⁰⁶ *Id.*, paras. 4, 7-8.

³⁰⁷ *Id.*, para. 17.

³⁰⁸ *Id.*

³⁰⁹ *Id.*, paras. 17-18.

to give effect to these treaties, usually makes no mention of the necessity of such links either. Conversely, treaty-based jurisdiction has two requirements insofar as jurisdiction to prescribe is concerned, both of which serve to limit the scope and application of this type of jurisdiction. First, this jurisdiction envisages and expressly requires the presence of the alleged offender in the territory of the prescribing state.³¹⁰ For example, it will be recalled from the textual analysis of Article 5(2) of the CAT that the common wording used in the Hague formula provides that a party shall “establish its jurisdiction over the offence in the case where the alleged offender is present in its territory”. Second, the alleged offender must not be extradited. In the words commonly used in the Hague formula, the prescribing state’s jurisdiction applies “if it does not extradite him”.³¹¹ Equally, national legislation giving effect to these treaties often make mention of the necessity of the subsequent presence of the accused in the prescribing state’s territory and the suspect is not extradited.

The establishment of treaty-based jurisdiction (and its enforcement) is mandatory in situations where there is an obligation to prosecute alleged offenders who are present in the prescribing state’s territory and, for whatever reason, not extradited to another relevant jurisdiction with a link to the offense, either in the form of a state party or, for example, an ad hoc international³¹² or regional³¹³ criminal tribunal or a permanent international criminal tribunal in the case of the ICC.³¹⁴

³¹⁰ See also Arrest Warrant, *supra* note 2, paras. 57 (Higgins et al., JJ., joint sep. op.), 9, 15 (President Guillaume).

³¹¹ *Supra* note 3, Art. 5(2).

³¹² *Infra*, notes 388-93.

³¹³ In the wake of the *Habré* case, Senegal concluded an agreement with the AU to prosecute Habré in a newly established “Extraordinary African Chambers” in order to implement the extradite or prosecute obligation in the CAT. See Agreement Between the Government of the Republic of Senegal and the AU on the Establishment of Extraordinary African Chambers Within the Senegalese Judicial System, (Aug. 22, 2012), at http://www.forumchambresafricaines.org/docs/Agreement_AU-Senegal_establishing_AEC.pdf.

³¹⁴ ICC Statute, *supra* note 262, Art. 17.

There are various forms of treaty-based jurisdiction and it is not confined to treaties creating extradite or prosecute obligations. For example, such jurisdiction may arise from an agreement between states, such as the agreement between allied powers at the end of World War II to prosecute international crimes committed by persons belonging to a “common enemy”.³¹⁵ Treaty-based jurisdiction may also arise out of binding UN Security Council resolutions in response to specific situations, with the UN Charter as the ultimate source of legal authority,³¹⁶ as well as the Rome Statute of the ICC under the principle of complementarity.³¹⁷

C. Treaty-Based Jurisdiction Distinguished from Grounds of Jurisdiction in Custom

Contrary to the opinion of Professor Yee, treaty-based jurisdiction differs from principles of jurisdiction in customary international law in at least two important respects. First, the treaty itself provides a sufficient basis in international law for asserting extraterritorial jurisdiction and *ipso facto* creates important links between the Custodial State and a relevant treaty offense occurring abroad. As such jurisdiction is based on treaty and limited to the treaty context, unlike principles of jurisdiction under general international law, no further evidence of a special link between the prescribing state and the crime in issue is needed.³¹⁸ In fact, a party would be unable to fulfil its contractual obligations if treaty-based jurisdiction required specific links with a Custodial State to be proven. Although further proof of such a link may be irrelevant, this is not “universal jurisdiction”; that is, treaty-based jurisdiction is not the competence of *any* state to prosecute crimes, based on the gravity of the crime alone and for the protection of international community values, in the absence of *any* link at all with the state. States parties to a treaty regime agree to the use of treaty-based jurisdiction but not to universal jurisdiction. Second, treaty-based

³¹⁵ *Infra*, note 338.

³¹⁶ *Infra*, note 388.

³¹⁷ ICC Statute, *supra* note 262, Art. 17.

³¹⁸ *See also* Note submitted to Office of Legal Affairs (China), *supra* note 236, para. 6.

jurisdiction is obligatory (and not merely permissive), the exercise of which is triggered by the presence of the accused and the failure to extradite to another party to the treaty regime. Thus, treaty-based jurisdiction applies *inter partes* in order to enable a Custodial State to perform its contractual obligations *vis-a-vis* Paragraph 1 States (and to protect the latter's national vital interests implicated by an alleged offense).³¹⁹ The enforcement of this treaty-based jurisdiction by states parties on each other's behalf, where extradition is not forthcoming, is precisely the reason why extradite or prosecute obligations are triggered only upon the accused's presence in the territory of a state party.

For example, during the proceedings of the *Habré* case, Eric David, one of the Counsel and Advocates of Belgium, asserted in response to Senegal's refusal to extradite Habré to Belgium that, "[f]or Senegal, it is not so much a question of exercising universal jurisdiction as one of performing its obligations to prosecute or, failing that, to extradite" to Belgium.³²⁰ David continued: "[t]herefore, it matters little how we characterize the jurisdiction that Belgium is asking Senegal to exercise: what matters is that it exercises that jurisdiction."³²¹

D. Rationale of Treaty-Based Jurisdiction

The purpose of treaty-based jurisdiction is to implement extradite or prosecute obligations. Although extradite or prosecute obligations have been included in numerous treaties with diverse variations,³²² a common feature in the relevant provisions is the concept's *raison d'être*; that is, to prevent impunity by enabling states parties to a particular treaty regime that

³¹⁹ See also Arrest Warrant, *supra* note 2, paras. 21-22 (Higgins et al., JJ., joint sep. op.), 7-15 (Guillaume, J., sep. op.), 56 (Ranjeva, J., dec.); Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Lib. Arab Jam. v. U.K.), Provisional Measures, 1992 I.C.J. REP. 9, paras. 1-3 (Apr. 14) (Evensen et al., JJ., j. dec.) ("Lockerbie"); secretary-general report (2010), *supra* note 18, para. 20; Yee, *supra* note 7, at 512-19.

³²⁰ Oral Proceedings, *supra* note 68, at 28.

³²¹ *Id.* at 29.

³²² Secretariat survey, *supra* note 30.

have a link with an alleged offense to apprehend and prosecute the accused, or else have a prosecution undertaken on their behalf by the Custodial State in whose territory the accused has taken refuge. Contrary to the ICJ's opinion in the *Habré* case, the reason why states prevent impunity is not for the exclusive protection of a "common interest."³²³ It is because treaty crimes implicate and may even be injurious to certain of their own national vital interests, as exemplified by the relevant treaty provisions.³²⁴ The underlying rationale of treaty-based jurisdiction is therefore seems to be the reciprocal protection of national vital interests. The pragmatic and mutually beneficial nature of the obligation, by enabling an "injured" state to have offenders surrendered for prosecution, or punished on its behalf by the Custodial State failing extradition, is precisely the reason why Grotius first referred to the obligation in the early seventeenth century.³²⁵

The CAT's *travaux préparatoires* indicate that the rationale for including the extradite or prosecute obligation is to make the instrument more effective by enabling Paragraph 1 States, primarily under the principles of territoriality and nationality jurisdiction, to obtain custody of the accused by placing a duty on the Custodial State to extradite. It was understood that the use of the obligation would mean that in "the frequent situations where a regime under which torture was practiced is overthrown, and the new regime in the country is anxious to bring the torturers to justice, it would be more difficult for the perpetrators to escape the consequences of their acts by fleeing to another country."³²⁶ To that end, there was support among the Working Group that "an alleged offender should normally be tried by the State in whose territory the offense is

³²³ Judgment, *supra* note 1, paras. 68, 74.

³²⁴ *Supra*, notes 286-92.

³²⁵ Garrod (2012), *supra* note 9, at 812; Reydam, *supra* note 7, at 10-14; Report of the ILC on the Work of its Fifty-Sixth Session, UN GAOR, 59th Sess., Supp. No. 10, UN Doc. A/59/10, annex, para. 2; Special Rapporteur (preliminary report), The obligation to extradite or prosecute (*aut dedere aut judicare*), paras. 5, 8, UN Doc. A/CN.4/571 (2006).

³²⁶ BURGERS & DANIELIUS, *supra* note 208, at 58, 131; UN Doc. E/CN.4/1314, *supra* note 208, para. 15.

committed.”³²⁷ There was an assumption that a Paragraph 1 State, particularly the state in whose territory the crime had occurred or whose national had committed the crime abroad, would normally exercise its jurisdiction over an alleged offense and remove the immunity of their own officials (as opposed to any other state party). This may explain the reason why delegations during the negotiation of Article 5(2) gave no consideration, failing extradition by a Custodial State, to the issues raised by the removal of the immunity of state officials from the criminal jurisdiction of foreign states. It may equally explain the inherent conflict in the CAT between such immunity and the requirement that alleged offenders act in an official capacity. The latter dilemma did not come to the fore before a national court until more than a decade after the CAT had come into force in *Pinochet*.³²⁸

On the other hand, during the drafting of the CAT delegates recognized that extradition, as a sovereign act, is not an absolute obligation.³²⁹ Accordingly, the Custodial State, by failing to extradite the accused to a Paragraph 1 State, has an obligation to establish its jurisdiction on their behalf, in order to prevent the latter from becoming an “injured State” within the meaning of Article 42 of the Articles on State Responsibility.³³⁰ The ever-present possibility that extradition may not be forthcoming is precisely the reason for the mandatory treaty-based jurisdiction arising out of the extradite or prosecute obligation and its inclusion in Article 5(2) of the CAT.³³¹ The above interpretation was envisaged by De Visscher in 1926, long before the obligation to

³²⁷ UN Doc. E/CN.4/L. 1576, *supra* note 208, at 8; UN Doc. E/CN.4/1475, *supra* note 208, at 8 ; Commission on Human Rights, 37th Sess., ESCOR, Supp. (No. 5), 58, UN Doc. E/1981/25 (1981), UN Doc. E/CN.4/1475 (1981).

³²⁸ *Supra* note 118.

³²⁹ UN Doc. E/CN.4/1984/72, *supra* note 226, at 6.

³³⁰ *See also* Yee, *supra* note 7, para. 21.

³³¹ *See also* Yousef, *supra* note 6, at 94-96, 108-11.

extradite or prosecute was included in modern treaties, during the effort of the League of Nations to codify extraterritorial criminal jurisdiction and extradition.³³²

1. Protection of the Custodial State's National Vital Interests

There is nothing in the CAT or any other treaty providing for extradite or prosecute obligations that creates a hierarchy of jurisdiction. Therefore, a Custodial State, in addition to being required to protect the national vital interests of other states parties in cases of non-extradition, is able to assert treaty-based jurisdiction in cases where crimes threaten or implicate its own national vital interests. In such a situation, the Custodial State has the ability to assert broad extraterritorial jurisdiction without the burden of having to rely on one of the narrower grounds of jurisdiction specified in the relevant treaty regime, which would otherwise require evidence of a link with the alleged offense or offender. All that has to be proven by the Custodial State is the accused's presence and the failure to extradite to another party. The wording of Article 5(2) of the CAT does not limit such an interpretation of treaty-based jurisdiction; and, indeed, it reflects the way in which the CAT and other treaties have been implemented in state practice.³³³

2. Preventing Impunity

There is little doubt that universal jurisdiction and the treaty-based jurisdiction contained in extradite or prosecute obligations both have the purpose of preventing impunity. However, the latter's rationale is to prevent the impunity of crimes that have important links with one or more

³³² James L. Brierly & Charles de Visscher, *Report of the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law*, 20 AJIL (SPEC SUPP) 252 (1926).

³³³ *E.g.*, Ould Dah, *supra* note 131; Yousef, *supra* note 6. *See also* Lockerbie, *supra* note 319; R v. Zardad (High Court, Jul. 19, 2005) (no written judgment available); S v. Okah (SS94/2011) [2013] ZAGPJHC 6 (Jan. 21, 2013); U.S. v. Bout, 12-1487-cr (2d Cir. 2013); U.S. v. Shi, 396 F.Supp.2d 1132, *aff'd* U.S. v. Shi, 525 F.3d 709, 722, 724-25 (9th Cir. 2008); U.S. v. Yousef, No. S3 08 Cr. 1213(JFK), 2010 WL 3377499 (S.D.N.Y. Aug. 23, 2010); U.S. v. Yunis, 924 F.2d. 1086, 1092 (D.C. Cir. 1991); U.S. v. Ahmed et al., 2011 U.S. Dist. LEXIS 123182, 4-5 (S.D.N.Y. Oct. 21, 2011); John De Pue, *Extraterritorial Jurisdiction and the Federal Material Support Statutes*, ATT'S BULL., Sep. 2014, at 16-17; UN Doc. A/CN.4/690, *supra* note 6, paras. 110-11.

states parties to the particular treaty regime. In that regard, the Custodial State prosecutes the offense on behalf of a state that has such a link, and not solely as an agent of the international community. There is no evidence to suggest, either by virtue of the operative provisions of such treaties or based on the way in which they have been implemented *in concreto*, that they are concerned with the exclusive protection of international community values.³³⁴ Of course, treaties that contain crimes under international law and protect human rights in time of peace or armed conflict (such as the 1949 Geneva Conventions and CAT) means that states, in implementing extradite or prosecute obligations, may also protect, either indirectly or incidentally, some of the same international community values as the principle of universal jurisdiction. As a prerequisite, the types of international community values falling within universal jurisdiction's scope require agreement among states. The extent to which extradite or prosecute obligations protect the same values as universal jurisdiction, which is far from clear, does not warrant treating the two concepts as one and the same.³³⁵

The interpretation of treaty-based jurisdiction arising out of extradite or prosecute obligations and its underlying rationale is not only consistent with the facts of the *Habré* case but is supported by the few examples of the way in which treaty obligations have been implemented and state practice with regard to international crimes generally.

E. *Typology of Treaty-Based Jurisdiction: Case Studies*

Informed by the empirical findings in table 1, this final section analyzes key case studies which show that common examples of universal jurisdiction state practice are actually better explained as different types of treaty-based jurisdiction. The types of treaty-based jurisdiction

³³⁴ Part I, note 28.

³³⁵ The latter point is further illustrated by the ICC Statute, *supra* note 262, pmbl. & Arts. 13, 17. *But see* the controversial decision of the South African Supreme Court, [2013] ZASCA 168, *supra* note 28, para. 39.

considered are: prosecutions relating to World War II, prosecutions with a treaty's support, prosecution of a resident who cannot be extradited, and prosecution under a general treaty.

1. *Historical Prosecutions Relating to World War II*

The first typology concerns crimes committed during the period of World War II, all of which are context specific and were tried *ex-post facto* (table 1). All of these trials stem from landmark treaties concluded by allied powers at the end of the war, which determine the types of conduct deemed to be criminalized under international law, including “war crimes”, and limit jurisdiction to such crimes to the period of the war in which they were engaged, by persons belonging to a “common enemy”, that were injurious to allied states and their nationals.³³⁶ These trials have been almost unanimously claimed by scholars as evidence of universal jurisdiction, with *Eichmann* being cited more than any other.³³⁷ And yet, it has been overlooked time and again that Israel’s domestic law, titled “The Law for Meting out Justice to Nazis and their Collaborators”, did not provide for universal jurisdiction.³³⁸ It was limited temporally to crimes committed during the period of World War II and by persons belonging to a common enemy (the Nazi regime) or in an enemy country. It was also concerned with “crimes against the Jewish people.” The domestic law of Israel was thus subject to the same jurisdictional limitations as that of the other Allies at the end of the war.³³⁹ As Eichmann was charged with crimes against Jews, the District Court in that case found that the extraterritorial application of Israel’s domestic law was based on the protective principle of jurisdiction, a decision with which the Supreme Court

³³⁶ Garrod (2012), *supra* note 9, at 773-95.

³³⁷ Eichmann (Dist. Ct.), *supra* note 54. *E.g.*, Langer, *supra* note 50, at 3-4, 7-9, 15; O’Keefe, *supra* note 25, at 756-57; Randall, *supra* note 10, at 810-15; Scharf, *supra* note 50, at 278; Tomuschat, *supra* note 24, at 231-32. *See also* Furundžija, *supra* note 54, para. 156;

³³⁸ NAZI AND NAZI COLLABORATORS (PUNISHMENT) LAW, 5710-1950, SH NO. 404, 140. The same legislation in Eichmann was relied on in Demjanjuk, *supra* note 28.

³³⁹ Garrod (2012), *supra* note 9, at 809.

was in full agreement.³⁴⁰ The statement by the District and Supreme Courts that jurisdiction could also be justified on the basis of universal jurisdiction was little more than *dictum*.³⁴¹ In all likelihood, the fact that the District and Supreme Courts invoked universal jurisdiction and proclaimed to prosecute Eichmann “merely as the organ and agent of the international community”³⁴² was because Israeli agents had abducted Eichmann from Argentina without first seeking the approval of the Argentinian authorities. In reaction to the covert operation, Argentina complained before the UN Security Council that its sovereignty had been violated.³⁴³ In any event, neither the District nor the Supreme Court provided any evidence of state practice to support the existence of universal jurisdiction or its applicability over war crimes or any of the other crimes with which Eichmann was charged. The *dictum* of a domestic court does not create a customary rule. Caution is due when assessing the evidentiary value of precedents such as *Eichmann*.³⁴⁴

In the Sixth Committee debate on universal jurisdiction, the Israeli delegation does not recognize *Eichmann* as an example of universal jurisdiction, no less a historical precedent, or the inclusion of this jurisdiction in its domestic law over any crime.³⁴⁵ Moreover, a conceptual distinction is made between jurisdiction arising out of treaty obligations to extradite or prosecute, for which provision is made in the domestic law of Israel – “even if the person committing the offense is not an Israeli citizen or resident and irrespective of where the offense was committed”

³⁴⁰ *Eichmann* (Dist. Ct.), *supra* note 54, at 49-57; *Eichmann* (S. Ct.), *supra* note 28, at 304.

³⁴¹ *Id.* (Dist. Ct.) at 38-39; *Id.* (S. Ct.) at 303-04.

³⁴² *Id.* (Dist. Ct.) at 15; *id.* (S. Ct.) at 300.

³⁴³ Letter Dated 15 June 1960 from the Representative of Argentina Addressed to the President of the Security Council, UN Doc. S/4336 (1960); SC Res. 138 (June 23, 1960).

³⁴⁴ See also Tom Ruys, *The Meaning of “Force” and the Boundaries of the Jus Ad Bellum: Are “Minimal” Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AJIL 159, 168 (2014).

³⁴⁵ Note submitted to Office of Legal Affairs (Israel) (May. 3, 2010), at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Israel.pdf.

– and universal jurisdiction.³⁴⁶ The Israeli delegation does not question the existence of a customary rule of universal jurisdiction, perhaps unsurprising in light of the judicial *dicta* in *Eichmann*, and, instead, emphasizes that there are too many “uncertainties” regarding the legal status, definition and scope of universal jurisdiction that are essential for states to agree on before it is applied in practice.³⁴⁷

In addition to the practice of Israel, in the late 1980s and early 1990s, the interest of a small number of states in the prosecution of war crimes was revived after it became apparent that numerous Nazi war criminals from World War II had subsequently acquired citizenship in these respective countries, which included France, Canada, Australia and Britain. This is not helped by the fact that several of these states claimed that they were justified in enacting legislation for the prosecution of war crimes on the basis of universal jurisdiction. For example, two of the seven judges of the High Court of Australia in *Polyukhovich* referred in their *dicta* to the existence of universal jurisdiction over war crimes and crimes under international law.³⁴⁸ It seems to have been forgotten by these states that they had not actually used universal jurisdiction at the end of World War II. In any event, the legislation enacted by these states is limited to crimes by persons belonging to a common enemy during the period of the Second World War, in which these states had been engaged, and who are subsequently residing in the territory of the prosecuting state. Thus, the legislative provisions, and the few trials brought under them, are not based on universal jurisdiction.³⁴⁹ Rather, they are an extension of the practice of the same Allies at the end of the World War II (with the additional qualification that suspects are subsequently resident in the

³⁴⁶ *Id.*

³⁴⁷ UN GAOR, 71st Sess., 14th mtg., paras. 7-10 (Israel), UN Doc. A/C.6/71/SR.14 (Oct. 31, 2016).

³⁴⁸ *Polyukhovich*, *supra* note 54, paras. 32 (Brennan, J.), 21-35 (Toohey, J.).

³⁴⁹ *E.g.*, *Fédération Nationale des Déportés et Internes Résistants et Patriotes v. Barbie* (Cass., Oct. 6, 1983), 78 ILR 124 (1988); *R v. Finta*, [1994] 1 S.C.R. 701; *R v. Sawoniuk* [2000] EWCA Crim 9 (Feb. 10, 2000).

prosecuting state).³⁵⁰ In addition to jurisdiction developing out of the practice of allied powers at the end of World War II, treaty-based jurisdiction was subsequently incorporated into the 1949 Geneva Conventions, which became the foundation of modern international humanitarian law.

1949 Geneva Conventions

One extradite or prosecute regime that is different to the Hague formula is that contained in the “grave breaches” of the 1949 Geneva Conventions and Article 85(1) of the First Additional Protocol to the 1949 Geneva Conventions.³⁵¹ Unlike treaties that use the Hague formula, the grave breaches require states parties to prosecute alleged offenders present in their custody, failing extradition to another party, whose disputed acts have no express jurisdictional link to that or any other state party. As the jurisdiction of the prosecuting state party appears, at least at first sight, to be based solely on the mere presence of the accused, this has led some states, the ICRC and numerous scholars to read these latter provisions as the first treaty-based embodiment of universal jurisdiction.³⁵²

Even where a particular treaty does not use the Hague formula and therefore does not expressly require that a crime has a jurisdictional link to one or more of the parties, this should not be automatically interpreted as establishing a principle of universal jurisdiction.³⁵³ In their Joint Separate Opinion in the *Arrest Warrant* case, Judges Higgins et al. commented on the grave

³⁵⁰ Garrod (2012), *supra* note 9, at 813; *also* Reydams, *supra* note 8, at 15.

³⁵¹ Convention [1] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 UNTS 31, Art. 49; Convention [2] for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 UNTS 85, Art. 50; Convention [3] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 UNTS 135, Art. 129; Convention [4] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 UNTS 287, Art. 146; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 UNTS 3.

³⁵² Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT-94-1-A, paras. 79-80 (Oct. 2, 1995); CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 604 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); Higgins, *supra* note 7, at 92; IIL, *supra* note 26, Art. 3(a); Langer, *supra* note 50, at 4; O’Keefe, *supra* note 41, at 819, 828; Tomuschat, *supra* note 24, at 248, 250, 336, 334, 336, 350-51, 370.

³⁵³ See *also* Reydams, *supra* note 7, at 16-18; Yee, *supra* note 7, paras. 23, 25.

breaches and suggested that “[n]o territorial or nationality linkage is envisaged, suggesting a true universality principle.”³⁵⁴ On the other hand, the judges suggested that no case has touched upon the “jurisdictional possibilities” of the Geneva Conventions and remains to be judicially tested.³⁵⁵ It is submitted that treaties such as the Geneva Conventions are more persuasively interpreted as a form of treaty-based jurisdiction as opposed to universal jurisdiction. This is indicated for two reasons.

Drafting History

First, the drafters of the Geneva Conventions never contemplated universal jurisdiction. Britain had a profound influence on the development of the laws of war and opposed the codification of war crimes and criminal sanctions for violations of the laws of war (including extraterritorial jurisdiction over such crimes) in existing customary international law generally.³⁵⁶ Consequently, the compromise among delegations was that these conventions are much more limited in scope and instead prohibit certain conduct as “grave breaches” and provide only for an obligation to extradite or prosecute alleged offenders. It follows that the grave breaches do not codify principles of jurisdiction in existing customary international law.³⁵⁷ This is reaffirmed by the fact that the Geneva Conventions were adopted less than a year after the Genocide Convention. The drafters of the Genocide Convention rejected the inclusion of universal jurisdiction as it would go “against the traditional principles of international law and ... might therefore create dangerous international tensions.”³⁵⁸

Historical Context

³⁵⁴ *Supra* note 2, para. 31 (Higgins et al., JJ., joint sep. op.).

³⁵⁵ *Id.*, para. 32.

³⁵⁶ Garrod (2016), *supra* note 9.

³⁵⁷ *Id.*

³⁵⁸ Garrod (2012), *supra* note 9, at 810; Reydam, *supra* note 7, at 15-17; Reydam, *supra* note 8, at 11-12.

Second, the grave breaches are an early formulation of the obligation to extradite or prosecute, using imprecise and broadly worded language, which was repeated with greater clarity in subsequent treaties that use the Hague formula.³⁵⁹ As has already been shown elsewhere, the grave breaches have to be read in their proper historical context and in the light of state practice and the records of the United Nations War Crimes Commission at the end of World War II.³⁶⁰ The grave breaches were adopted in order to counter (in future armed conflicts) a number of serious inter-related problems experienced by the Allies at the end of the war. On the one hand, the jurisdiction of Allies injured by violations of the laws of war was limited *ratione temporis* to the period of the war and *rationae personae* to persons belonging to a “common enemy.”³⁶¹ On the other, the Allies were either unwilling and/or unable due to inadequate domestic laws to prosecute their own or each other’s nationals for such violations committed against the enemy.³⁶² At the same time, many alleged offenders had taken refuge abroad, particularly in neutral countries.³⁶³ The latter did not have domestic laws criminalizing violations of the laws of war.³⁶⁴ Moreover, the Allied and neutral states in whose territories alleged offenders had taken refuge were often unwilling to cooperate and extradite them to the states injured by such violations and they had no legal obligation to do so.³⁶⁵

A careful reading of the actual text of the grave breaches and various other primary sources, most notably archival records and records of the Diplomatic Conference leading to the adoption of the Geneva Conventions and the authoritative article-by-article commentary of Pictet, reveals the “novel character” of the grave breaches. First, they place an obligation on all

³⁵⁹ Arrest Warrant, *supra* note 2, para. 30 (Higgins et al., JJ., joint sep. op.).

³⁶⁰ Garrod (2012), *supra* note 9, at 810-12; Reydam, *supra* note 7, at 17-18; Reydam, *supra* note 8, at 11-12.

³⁶¹ Garrod (2012), *id.* at 779-83.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

states parties (including neutrals) to criminalize certain conduct as “grave breaches” and, second, require them to prosecute alleged offenders found on their territory if there is a failure to hand over alleged offenders “to another High Contracting Party concerned.”³⁶⁶ During the Diplomatic Conference, a proposal to limit the obligation to search for and bring to trial alleged offenders, failing extradition to a “Party concerned,” to the parties to an armed conflict was withdrawn after it was explained that the “principle of universality applied.”³⁶⁷ This reference to “universality” in the preparatory work does not mean the principle of universal jurisdiction proper, as is often assumed.³⁶⁸ It means that the above obligation to extradite or prosecute applies to all parties, regardless of whether they are belligerents or neutrals, and that such an obligation does not violate a state’s neutrality. The broadly worded language used by the grave breaches, “regardless of their nationality,” means that parties are not permitted to limit the scope of their extradite or prosecute obligation to persons found on their territory who are regarded as belonging to the enemy. The obligation includes their own nationals, as well as the nationals of their Allies and neutrals.

It is a *non sequitur* to read a Custodial State’s jurisdiction in the grave breaches as being based on the mere presence of the accused. Rather, jurisdiction has its basis in treaty, which must be enforced when an alleged offender is found on its territory and is not extradited to a “Party concerned” (that is, if a meaningful link exists between the offense and the state requesting extradition).³⁶⁹ Therefore, in situations of non-extradition, a Custodial State is required to initiate

³⁶⁶ Final Record of the Diplomatic Conference of Geneva of 1949, vol. II, sec. B, 39, at 116-17 (1949), at www.loc.gov/r/rfd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html; JEAN S. PICTET, COMMENTARY, I, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD (1952).

³⁶⁷ *Id.* at 116.

³⁶⁸ *E.g.*, Eichmann (Dist. Ct.), *supra* note 54, at 38; Knesević (S. Ct., Nov. 11, 1997), 1 Y.B. INT’L H.L. 535 (1998) 605 (Eng. trans.); O’Keefe, *supra* note 41, at 815; secretariat survey, *supra* note 30, paras. 49-57.

³⁶⁹ Reydamas, *supra* note 8, at 13.

criminal proceedings against alleged offenders on behalf of a “Party concerned.” The reason why the grave breaches do not expressly require a jurisdictional link to some of the parties to the Geneva Conventions is because such breaches were *ipso facto* regarded as injurious to one or more of the parties to an armed conflict. Hence, the grave breaches used the broad language “Party concerned.”

2. *Prosecutions Pursuant to Treaty Obligations to Extradite or Prosecute*

The second typology concerns crimes in violation of treaties providing for extradite or prosecute obligations. As discussed above, these obligations give rise to treaty-based jurisdiction, which has important links with one or more parties to the relevant treaty-regime and the crime at issue. States have asserted jurisdiction and undertaken prosecutions pursuant to these obligations in one of two situations. First, where the offense in question implicates or affects a state party’s nationals (or residents) and/or national vital interests. This is precisely what has occurred, for example, in the practice of Spain – one of the so-called pioneers of universal jurisdiction.

Spanish practice

The Spanish delegation has stated that *Pinochet* “became a model for the exercise of universal jurisdiction in Spain.”³⁷⁰ However, *Pinochet* had nothing to do with the principle of universal jurisdiction proper. Spain requested Pinochet’s extradition from the Custodial State – the U.K. – and claimed that it had “universal jurisdiction.” Yet, Spain was essentially a Paragraph 1 State under the CAT on the ground that more than 50 Spanish nationals had been among the victims of alleged torture committed in Chile, which was held by Spain’s National

³⁷⁰ Note submitted to Office of Legal Affairs, 4 (Spain) (Nov. 12, 2010), at [www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Spain%20\(S%20to%20E\).pdf](http://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Spain%20(S%20to%20E).pdf).

Court Criminal Division to give Spain a “legitimate interest in the exercise of such jurisdiction.”³⁷¹ Why, then, did Spain claim “universal jurisdiction”?

The national law of Spain, as it then existed, provided that “Spanish jurisdiction is competent to try acts committed by Spaniards and foreigners outside the national territory” for crimes “under Spanish law,” including crimes that “under international treaties and agreements, must be prosecuted in Spain.”³⁷² Thus, Spain regarded ratified treaties (including treaties containing extradite or prosecute obligations) as either permitting or requiring Spain to exercise “universal jurisdiction” (even in situations where a crime is linked to a Spanish national interest or victim). The interpretation of jurisdiction in treaty obligations to extradite or prosecute as “universal jurisdiction” may have been because, until 2009, jurisdiction over crimes committed abroad based on the nationality of the victim was unknown in Spain’s domestic law.³⁷³ This would suggest that Spain had previously justified the extraterritorial application of its domestic law based on “universal jurisdiction” (to the extent that such jurisdiction was deemed to exist conceptually and legally in Spain’s domestic legal and constitutional system) as comporting with international law. It did so by interpreting treaties as a legal source of authority for universal jurisdiction.³⁷⁴ Spain also appears to have relied on its own domestic law in order to identify the existence of universal jurisdiction in customary international law. This methodology puts the cart before the horse, as it passes over the underlying question whether the state is *permitted* by international law to exercise universal jurisdiction and, if so, over what crimes.

³⁷¹ Pinochet (No. 1), *supra* note 118, at 903 (Lord Slynn); UN Committee against Torture, Marcos Roitman Rosenmann v. Spain, Communication No. 176/2000, paras. 2(3), 6(7), UN Doc. CAT/C/28/D/176/2000 (Apr. 30, 2002).

³⁷² LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] [LAW ON THE JUDICIARY], Art. 23(4).

³⁷³ Guatemalan Generals, S.T.C. No. 237/2005, Sep. 26, 2005, 8 Y.B. INT’L H.L. 507 (2005) (Eng. trans.); Note submitted to Office of Legal Affairs (Spain), *supra* note 370, at 2, 8-9.

³⁷⁴ Note submitted to Office of Legal Affairs (Spain), *id.* at 1-2, 5, 8-11.

In the *Guatemalan Generals* case, involving an attack on a Spanish embassy and its employees and a Spanish ambassador, as well as crimes committed against Spanish nationals in Guatemala, the Constitutional Court held that Spain's domestic law "establishes a principle of absolute universal jurisdiction" and that it is "quite debatable" whether international law requires a connection with Spanish national interests in order for Spain to exercise such jurisdiction.³⁷⁵ While the Constitutional Court may have been correct in pointing out that Spain's domestic law did not envisage proof of such a link, nonetheless, the court was not able to show, beyond asserting that there are a "multitude of precedents in international law," that the legislation in question conformed with international law and, indeed, that the same "principle of absolute universal jurisdiction" existed in international law.³⁷⁶ It is clear that the Constitutional Court treated universal jurisdiction proper (to the extent that it was deemed to exist in custom) and treaty-based jurisdiction arising out of extradite or prosecute obligations as one and the same.

In any event, Spain has only been willing to exercise "universal jurisdiction" in cases where Spanish nationals and/or national vital interests have been implicated by an offense. This includes the *Scilingo* case—the only "universal jurisdiction" case in Spain to go to trial (table 1)—involving more than six hundred victims of Spanish nationality, during Argentina's military dictatorship between 1976 and 1983.³⁷⁷ In the light of Spanish practice, in its submission to the sixty-eighth session of the Sixth Committee, the Spanish delegation conceded that, with regard to the "significant number of cases based on the principle of universal jurisdiction" in Spanish practice since the mid-1990s, "[i]n a number of those cases, the victims of the crimes reported

³⁷⁵ S.T.C. No. 237/2005, *supra* note 373, paras. 3, 6.

³⁷⁶ *Id.*, para. 6.

³⁷⁷ Scilingo, S.T.S. No. 1362/2004, Nov. 15, 2004, 7 Y.B. INT'L H.L. 594 (2004) (Eng. trans.); Scilingo, Decision No. 16/2005, Apr. 19, 2005, 8 Y.B. INT'L H.L. 498, 504-05 (2005) (Eng. trans.). *See also* Anonymous Commentator, *The Spanish Indictment of High-Ranking Rwandan Officials*, 6 J. INT'L CRIM. JUST. 1003 (2008).

were Spanish citizens.”³⁷⁸ In any event, Spain amended its domestic law in 2009 so that its extraterritorial application requires the existence of “a relevant link with Spain.”³⁷⁹ As pointed out by Spain during the Sixth Committee, “it is no longer possible to speak” of universal jurisdiction in Spain.

Prosecution on Residents of Prosecuting State

The second situation in which states have prosecuted crimes pursuant to treaty obligations to extradite or prosecute is where suspects have been present in the prosecuting state’s territory and could not be extradited to another party due to the relevant treaty regime related to the crime at issue. In this latter situation, the Custodial State has an obligation to initiate criminal proceedings, failing extradition, on behalf of a party that has such a link. In most of these trials, the suspects were residents of the prosecuting state and their own state of nationality was supportive of prosecution (as suspects were former state officials or officials of a former regime that had been overthrown) but was unwilling to request extradition, or extradition was not legally or practically possible. This is illustrated, for example, by the practice of the Netherlands.

The Netherlands practice

Nzapali concerned the trial of a national of the Democratic Republic of the Congo (“DRC”) for torture who was serving as colonel of the Garde Civile of the DRC (table 1).³⁸⁰ Nzapali fled to the Netherlands and resided there for several years after the existing regime to which he belonged was overthrown. Since Nzapali could not be extradited to the DRC due to a

³⁷⁸ Note submitted to Office of Legal Affairs (Spain), *supra* note 131, para. 15.

³⁷⁹ UN secretary-general report, The Scope and Application of the Principle of Universal Jurisdiction, para. 25, UN Doc. A/68/113 (2013).

³⁸⁰ PROSECUTOR V. N, Case No. AO7178 (Rotterdam Dist. Ct., Apr. 7, 2004), in 51 NETHERLANDS INT’L L. REV. 439, 444-49 (2004) (Eng. trans.); Ward Ferdinandusse, *International Decision: Prosecutor v. N*, 99 AJIL 686 (2005).

real risk of being subject to torture by the successive government, the Netherlands had an obligation, pursuant to the CAT, to initiate criminal proceedings against him. The Netherlands essentially tried Nzapali on behalf of a Paragraph 1 State, the DRC, which assisted in the gathering of evidence for his trial. Moreover, Nzapali had already been convicted in his home country, *in absentia*, for abuse of authority and other relevant crimes. In a similar vein, the prosecution of 3 Afghans (table 1) concern suspects residing in the Netherlands and involved allegations of torture and war crimes, which, in the opinion of Dutch courts, the Netherlands has an international legal obligation to investigate, failing extradition, pursuant to relevant treaties.³⁸¹

In re Bouterse, the Dutch Supreme Court had to decide whether Dutch courts could assert jurisdiction, pursuant to the Torture Convention Implementation Act, over Desiré Bouterse – the leader of a military regime in Suriname – for alleged torture committed against military opponents during a coup d'état, led by Bouterse, in 1980.³⁸² The Supreme Court held that the CAT establishes “universal jurisdiction” but dismissed the complaint against Bouterse on the grounds that such jurisdiction could be asserted only in cases with a link to the Netherlands, such as the presence of the suspect (as is required by Article 5(2) of the CAT), and, in any event, the acts were not criminalized as such in the Netherlands at the time they were allegedly committed.³⁸³ The Dutch legislature subsequently followed this approach in the adoption of the 2003 International Crimes Act, which implements the Rome Statute of the ICC and criminalizes war crimes, genocide, crimes against humanity and torture, although assertions of jurisdiction over these crimes is dependent upon the presence of the accused in the Netherlands. This

³⁸¹ Hesam & Jalalzoy, Case No. 09/751005-04 (The Hague, Dist. Ct., Oct. 14, 2005), at <http://www.rechtspraak.nl>; Case No. 07/10064 (Netherlands S. Ct., Jul. 8, 2008), *at id*; Abdullah Faqirzada, Case No. 09/03090 (Netherlands S. Ct., Nov. 8, 2011), at <http://www.internationalcrimesdatabase.org/Case/1000/Faqirzada/>.

³⁸² Prosecutor-General of the Supreme Court v. Desiré Bouterse, Case No. LJN: AB1471, Judgment, Sep. 18, 2001, S.Ct. of the Netherlands. This case is reported in 32 NETH. Y.B. INT'L L 282 (2001) (Eng. trans.).

³⁸³ *Id.*, para. 8.5.

legislation is an example of treaty-based jurisdiction, implementing treaty obligations to prosecute alleged offenders present in the Netherlands, failing extradition to the ICC or another state party to a relevant treaty regime, and not an example of universal jurisdiction proper. In light of the Supreme Court's judgment in *Bouterse*, however, the Netherlands delegation has stated that the trials in table 1 "were premised on universal criminal jurisdiction."³⁸⁴

3. *Prosecutions Under General Treaty: Crimes Arising out of Internal Armed Conflicts in the Territories of the Former Yugoslavia and Rwanda*

The final typology concerns prosecutions of Former Yugoslavs and Rwandans under a general treaty, in this case the UN Charter, in the implementation of legally binding UN Security Council resolutions (table 1).³⁸⁵ These resolutions establish ad hoc international criminal tribunals with a mandate to prosecute crimes arising out of armed conflicts in the Former Yugoslavia and Rwanda. The tribunals have limited territorial, personal and temporal jurisdiction.³⁸⁶ Therefore, universal jurisdiction is not envisaged. The tribunals are given "primacy" over domestic courts,³⁸⁷ while "all" other states have an obligation to cooperate with them, including by taking "measures necessary under their domestic law" to proscribe and provide for jurisdiction over relevant crimes falling under the mandate of the tribunals.³⁸⁸ States are further required to search for suspects present on their territory and defer to the tribunals by transferring suspects to them for prosecution.³⁸⁹ Alternatively, the tribunals may refer cases to

³⁸⁴ Note submitted to Office of Legal Affairs (the Netherlands) (Jul. 1, 2010), at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Netherlands.pdf.

³⁸⁵ SC Res. 827 (May 25, 1993); SC Res. 955 (Nov. 8, 1994).

³⁸⁶ Updated Statute of the ICTY, Arts. 1-8 (Sep. 2009), at <http://www.icty.org/sid/135> ("ICTY Statute"); Statute of the International Criminal Tribunal for Rwanda, Arts. 1-7 (Jan. 2010), at http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf ("ICTR Statute").

³⁸⁷ ICTY Statute, *id.* Art. 9; ICTR Statute, *id.* Art. 8.

³⁸⁸ SC Res. 827, *supra* note 385, para. 4; SC Res. 955, *supra* note 385, para. 2.

³⁸⁹ *E.g.*, Tadić, *supra* note 352; ICTR Press Release, Alfred Musema transferred to Arusha (May 21, 1997), at <http://unictr.unmict.org/en/news/alfred-musema-transferred-arusha>; ICTR Press Release, Lieutenant Colonel Muvunyi transferred to ICTR Arusha (Oct. 30, 2000), at <http://unictr.unmict.org/en/news/lieutenant-colonel-muvunyi-transferred-ictr-arusha>; ICTR Press Release, Ndirabatswe Transferred to Arusha (Oct. 8, 2008), at <http://unictr.unmict.org/en/news/ngirabatware-transferred-arusha>.

states for trial instead of having them transferred.³⁹⁰ In the absence of the transfer of suspects to the tribunals or to the states in whose territory the crimes had occurred, a Custodial State has an obligation to prosecute. This explains why Former Yugoslavs and Rwandans represent the highest proportion of trials in table 1. Council resolutions essentially establish an obligatory extradite or prosecute regime; therefore, the jurisdiction used by states may be conceptualized as a type of treaty-based jurisdiction.

The prosecution of Former Yugoslavs and Rwandans is interpreted by scholars and the European Court of Human Rights as evidence of universal jurisdiction state practice.³⁹¹ In support of this interpretation, scholars cite Professor Reydam's.³⁹² Professor Reydam's reasoning is that relevant Council resolutions require states to search for and try suspects present in their territory for relevant crimes falling under the mandate of relevant tribunals, including grave breaches of the 1949 Geneva Conventions, and that the grave breaches provisions implement universal jurisdiction.³⁹³ However, since at least 2010, Professor Reydam's has reversed his position and argued that the grave breaches provisions and the prosecutions pursuant to them are not examples of universal jurisdiction.³⁹⁴

In all of the trials in table 1, the suspects were residents in the prosecuting states and extradition to the states where the crimes had been committed was legally, if not practically,

³⁹⁰ *E.g.*, In re Jorgić, 135 ILR 152 (Germany); Prosecutor v. Bucyibaruta, Request for Referral to France, Case No. ICTR-2005-85-I (Nov. 20, 2007); Prosecutor v. Munyeshyaka, Request for Referral to France, Case No. ICTR-2005-87-I (Nov. 20, 2007); Mpambara Will Not Be Tried in the Netherlands, Hague Justice Portal (Oct. 21, 2008, at www.haguejusticeportal.net/eCache/DEF/9/915.html). For relevant practice in the Netherlands, see OPENBAAR MINISTERIE (visited Aug. 25, 2017), at <https://www.om.nl/onderwerpen/international-crimes-0/what-cases-have-been/rwanda/>.

³⁹¹ *E.g.*, Jorgić v. Germany, No. 74613/01 (Jul. 12, 2007), para. 68, ECHR 2007-III; Kaleck, *supra* note 116; O'Keefe, *supra* note 41, at 814; Luc Reydam's, *Nyenteze v. Public Prosecutor*, 96 AJIL 231, 236 (2002); Scharf, *supra* note 50, at 281.

³⁹² *E.g.*, Langer, *supra* note 50, at 4, 13, 28.

³⁹³ *E.g.*, Reydam's, *supra* note 391.

³⁹⁴ Reydam's, *supra* note 7, at 22-24 & note 35; Reydam's, *supra* note 8.

impossible.³⁹⁵ The latter states often acquiesced or supported prosecution, so long as they were officials of overthrown regimes and not incumbent officials.³⁹⁶ For example, the four trials undertaken by Belgium (table 1) all involve Rwandan suspects and the implementation of binding council resolutions. Belgium has an additional link because the crimes had occurred in Rwanda - a former Belgian colony - and the suspects had acquired residence in Belgium and could not be transferred to the ICTR, while the successive Rwandan Government supported the prosecutions.³⁹⁷ Belgian nationals had also been killed during the genocide. Therefore, Belgium's exercise of jurisdiction is far from universal. It is perhaps of no surprise that, out of a handful of states that have prosecuted crimes committed in Rwanda, Belgium has undertaken the most prosecutions.

The prosecution of Former Yugoslavs and Rwandans in the other states in table 1 are not any different to the practice of Belgium; all of them involve close links between the crime in issue and the prosecuting state.³⁹⁸ For example, in *Jorgić*, the defendant—a Former Yugoslav—had been legal resident in Germany for a long time, including at the time when crimes in Bosnia were committed, and the German Constitutional Court held that universal jurisdiction “required

³⁹⁵ Various factors leading to a bar in extradition include the absence of an extradition agreement; fair trial concerns; real risk of human rights violations; and, until it was abolished in 2007, the death penalty for certain categories of *génocidaires* in the domestic law of Rwanda (ORGANIC LAW NO. 31/2007, Jul. 25, 2007).

³⁹⁶ *E.g.*, Knešević, *supra* note 368; Nyontezze v. Public Prosecutor (Tribunal militaire de cassation, Apr. 27, 2001), in 96 AJIL 231 (2002) (Eng. trans.); Prosecution v. Refic Saric (S. Ct., Nov. 25, 1994, at www.internationalcrimesdatabase.org/Case/743/Saric/; Public Prosecutor v. Misrad Repak (Dist. Ct., Dec. 2, 2008), at www.icrc.org/ihl-nat/0/45061A413067E31CC125755C004A5773; Public Prosecutor v. Sadi Bugingo (Dist. Ct., Feb. 14, 2013, at www.internationalcrimesdatabase.org/Case/919/Bugingo/; Dicker, *supra* note 129, at 234.

³⁹⁷ Ntezimana et al. (Butare Four) (Cour d'assises, Bruxelles, 2001); Nzabonimana et al. (Cour d'assises, Bruxelles, Jun. 29, 2005); Ntuyahaga (Cour d'assises, Bruxelles, Jun. 29, 2007). *See also* Note submitted to Office of Legal Affairs (Belgium), *supra* note 171, para. 18.

³⁹⁸ In respect of the Netherlands, *see* Yvonne N, Case No. LJN: BZ8710 (The Hague Dist. Ct., Mar. 1, 2013), at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3ARBDHA%3A2013%3A8710>; Joseph M, Case No. LJN: 12/04592 (S. Ct. Nov. 26, 2013), at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI%3ANL%3AHR%3A2013%3A1420>.

some sensible nexus with Germany”.³⁹⁹ In the trial of a Former Yugoslav by Denmark is based on a provision of the Criminal Code implementing treaty and Council resolution obligations in which “Denmark is obliged to have criminal jurisdiction” when a suspect is present in Denmark.⁴⁰⁰ This trial and the legislation on which it is based are not recognized by the Danish delegation as examples of universal jurisdiction. As with Denmark, the legislation of Norway does not provide for universal jurisdiction. Rather, it provides for extraterritorial jurisdiction over certain crimes committed abroad, by foreign nationals, where they are subsequently residents of Norway or if Norway has an obligation to provide for such jurisdiction in the implementation of international legal obligations.⁴⁰¹ Thus, the single trial of a Former Yugoslav (table 1) is not recognized by the Norwegian delegation as an example of universal jurisdiction either. The Canadian delegation, despite approving the existence of universal jurisdiction in custom in respect of genocide, crimes against humanity and war crimes, has not recognized provision for such jurisdiction in its domestic law, or Canada’s trial of a Rwandan (table 1) as an example of universal jurisdiction.⁴⁰² The national law of Canada, the “Crimes Against Humanity and War Crimes Act,” provides that a person may be prosecuted in Canada for specified crimes committed abroad: (a) if at the time of the offense the person was a Canadian citizen or a citizen of a state engaged in armed conflict against Canada, or the victim was a Canadian citizen or a citizen of a state allied with Canada in an armed conflict; or (b) if, after the time of the offense was committed, the person is present in Canada.⁴⁰³ The wording of sub-paragraph (b) is intended

³⁹⁹ *Supra* note 390, at 156, 166.

⁴⁰⁰ Note submitted to Office of Legal Affairs (Denmark) (visited Jun. 23, 2017), at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Denmark.pdf.

⁴⁰¹ Note submitted to Office of Legal Affairs (Norway) (May 7, 2010), at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Norway.pdf.

⁴⁰² Statement by Permanent Mission of Canada to the UN, The Scope and Application of the Principle of Universal Jurisdiction (Oct. 17, 2013), at <https://papersmart.unmeetings.org/media2/433370/canada-can-z-e-86.pdf>.

⁴⁰³ S.C. 2000, c. 24, sec. 8.

to implement international legal obligations binding on Canada, such as treaty obligations to extradite or prosecute and council resolutions. Thus, in *Munyaneza*, the first case to be tried under this legislation (table 1),⁴⁰⁴ the suspect resided in Canada and there was an obligation for Canada to act in concert with council obligations. The Superior Court in this case did not acknowledge the applicability of universal jurisdiction.⁴⁰⁵

On the other hand, the Swiss delegation has interpreted its domestic law as providing for universal jurisdiction and the single trial of a Rwandan (table 1) for war crimes as an example of so-called “conditional” or “limited” universal jurisdiction.⁴⁰⁶ However, national law requires the existence of a “close link” with Switzerland.⁴⁰⁷ On closer analysis, “universal jurisdiction” appears to be treaty-based jurisdiction by a different name. For example, the Swiss delegation suggests that the obligation to extradite or prosecute in treaties “is inextricably linked to the principle of universal jurisdiction” and that the assertion of universal jurisdiction can be an “obligation” as a result of international legal obligations.⁴⁰⁸ Moreover, such jurisdiction is subject to the twin conditions that the suspect is present in Swiss territory and has not been extradited to another jurisdiction.⁴⁰⁹

The national laws of states implementing council resolutions and the trials brought under them are not examples of proper universal jurisdiction because there is an objective link and a mandate from a legitimate international authority. In effect, these states are undertaking prosecutions in concert with and on behalf of the tribunals in the completion of their mandates and the states in whose territories the crimes had been committed.

⁴⁰⁴ R v. Munyaneza [2009] QCCS 2201.

⁴⁰⁵ *Id.*

⁴⁰⁶ Note submitted to Office of Legal Affairs (Switzerland), (Apr. 26, 2010) at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/Switzerland_E.pdf.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

CONCLUDING REMARKS

The assertion that treaty obligations to extradite or prosecute impliedly embody or permit a principle of “universal jurisdiction” is not a new one, but it is one that, at the present time, is gaining ground, particularly in the light of the *Habré* case. The present contribution, having critically examined the evidence upon which supporters of universal jurisdiction have relied, shows that such obligations are incapable of permitting or mandating universal jurisdiction. This finding is further corroborated by empirical evidence and the way in which these obligations have been implemented *in concreto* since the end of World War II to the present. It proposes that jurisdiction arising out of extradite or prosecute obligations is better conceptualized as “treaty-based jurisdiction.”

On the basis of the above assessment, a number of conclusions are merited.

First, the ICJ’s passing reference to Article 5(2) of the CAT as “universal jurisdiction,” regardless of what was actually meant by the term, is potentially misleading and should be followed, if at all, with caution in the future. Contrary to the ICJ’s opinion, extradition and prosecution are equal international obligations under the CAT. The Custodial State’s obligation to prosecute only arises when the obligation to extradite to a Paragraph 1 State (that is, a state that has made out a *prima facie* link with the crime at issue) is not fulfilled. The purpose of extradite or prosecute obligations is to enable Paragraph 1 States to obtain the custody of the accused, or have such persons prosecuted on their behalf, failing extradition. Thus, in *Habré*, Chad removed Habré’s immunity to allow criminal proceedings to be initiated in Belgium and cooperated closely with Belgium by allowing the latter’s public authorities to gather evidence on its territory. The same point applies, for example, to Afghanistan in relation to the prosecution of

Zardad in the UK⁴¹⁰ and to the DRC in connection with the prosecution of *Nzapali* in the Netherlands.⁴¹¹

Second, national laws implementing treaty obligations to extradite or prosecute and the few trials conducted on the basis of them should not be referred to as “universal jurisdiction” or used as evidence to infer the existence of universal jurisdiction. This is so for three key reasons. First, it gives a misleading and inaccurate empirical picture of state practice and the status of universal jurisdiction in customary international law. Second, the characterization of treaty obligations to extradite or prosecute as universal jurisdiction is fraught with conceptual difficulties and does not correspond with the actual text of treaties or state practice. Third, it leads to inter-state tensions as to what constitutes universal jurisdiction and how its scope and application should be defined. In this connection, there is a risk that interpreting treaties as support for universal jurisdiction could result in excessive—and unlawful—claims of jurisdiction (including over nationals of non-state parties to the relevant treaties), breaching other rules of international law and causing further conflict. This risk is a reality, as can be seen, for example, by the AU urging its member states to fully take advantage of the “Model National Law on Universal Jurisdiction over International Crimes,”⁴¹² which itself includes a wide range of crimes, and “to use the principle of reciprocity to defend themselves” by indicting non-African state officials;⁴¹³ and the arrest of Lieutenant General Emmanuel Karenzi Karake during an official

⁴¹⁰ *Supra* note 333.

⁴¹¹ *Supra* note 380.

⁴¹² Doc. EX.CL/731(XXI)c, adopted by the AU Executive Council at its Twenty-First Ordinary Session, Addis Ababa (2012).

⁴¹³ *E.g.*, UN GAOR, 68th Sess., 12th mtg., para. 74 (Egypt on behalf of African Group), UN Doc. A/C.6/68/SR.12 (Oct. 17, 2013); UN GAOR, 69th Sess., 11th mtg., para. 2 (Iran on behalf of NAM), UN Doc. A/C.6/69/SR.11 (Oct. 15, 2014); UN Doc. A/C.6/69/SR.12, *supra* note 17, para. 28 (Rwanda).

visit in the UK in 2015, which is condemned by the AU as a “blatant” abuse of universal jurisdiction and an “attack” on “Africa as a whole.”⁴¹⁴

Third, the lack of universal jurisdiction state practice raises two important questions. First, it is possible to identify the existence of a customary rule of universal jurisdiction? Second, to what extent is the support for the concept in the Sixth Committee really political, due to its laudable rationalization of fighting impunity, rather than evidencing *opinio juris*?⁴¹⁵ Verbal claims in support of universal jurisdiction do not necessarily reflect states’ underlying legal convictions and are, in any event, far from uniform. Broad verbal claims appear inconsistent with actual state practice. As emphasized by the African Group and reiterated by other delegations, a careful analysis of state practice and *opinio juris* is needed in order to identify the existence of a customary rule of universal jurisdiction over a particular crime.⁴¹⁶ The lack of state practice raises a broader issue. The importance and practical utility of universal jurisdiction may be overstated. How can something so rarely applied be called an essential tool in fighting impunity? Based on state practice, treaty obligations to extradite or prosecute are of much greater importance for preventing impunity. The lack of universal jurisdiction state practice would suggest that the concept itself does not work and is in urgent need of revision, especially if support for interpreting treaty obligations to extradite or prosecute, which protect vital national interests of states, continues to grow.

Fourth, after seven years of work at the Sixth Committee, the universal jurisdiction topic has come no closer to conclusion. Delegations have taken as their starting point that a customary

⁴¹⁴ Peace and Security Council, 519th mtg., Addis Ababa, Ethiopia (Jun. 26, 2015), PSC/PR/COMM.(DXIX), COMMUNIQUÉ, at www.peaceau.org/en/resource/90-organ-peace-security-council.

⁴¹⁵ Yee, *supra* note 7, para. 39.

⁴¹⁶ E.g., UN Doc. A/C.6/70/SR.12, *supra* note 17, paras. 7-9 (South Africa on behalf of African Group); UN Doc. A/C.6/70/SR.12, *supra* note 17, paras. 10 (Trinidad and Tobago on behalf of CARICOM), 23 (Singapore); 90 (UK).

rule of universal jurisdiction has historical foundations over piracy on the high seas, which has been falsely analogized with numerous other so-called ‘heinous’ crimes and jurisdiction in treaty obligations to extradite or prosecute. However, there is no agreement over which crimes universal jurisdiction applies other than piracy;⁴¹⁷ and no delegation has been able to identify the existence of universal jurisdiction. Second, broad and inaccurate language continues to prevail, with a number of delegations referring to extradite or prosecute obligations as “universal jurisdiction.” This would suggest that the debate has been wrongly postulated and misguided from the beginning because it is premised on historical misconceptions and false analogies.

As a result, significant disagreement on a number of other fundamental issues has arisen. These include which of the sixty or so treaties containing extradite or prosecute obligations, if any, establish “universal jurisdiction” and, if so, why; the sources of international law to support the applicability of universal jurisdiction over crimes contained in treaties; the definition of universal jurisdiction; the crimes, out of a potentially voluminous list, that fall under the scope of universal jurisdiction and why; and whether or not the exercise of universal jurisdiction is mandatory or permissive. As pointed out by the Chair of the Sixth Committee’s Working Group, “[n]o delegation had rejected the concept of universal jurisdiction, but the approaches to its meaning, scope and application had been many and varied.”⁴¹⁸

In an effort to “provide a middle ground between the positions of delegations,” the Sixth Committee Working Group has recently proposed to two different types of universal jurisdiction: universal jurisdiction in custom and “treaty-based forms of universal jurisdiction.”⁴¹⁹ However,

⁴¹⁷ Several powerful states have doubted universal jurisdiction’s existence in customary international law, *e.g.*, UN Doc. A/C.6/69/SR.11, *supra* note 413, para. 19 (Russia); UN Doc. A/C.6/71/SR.14, *supra* note 347, paras. 19 (Saudi Arabia), 27 (India); Note submitted to Office of Legal Affairs (China), *supra* note 236; Note submitted to Office of Legal Affairs (Korea) (visited Jun. 23, 2017), at http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri_StatesComments/RepublicofKorea.pdf.

⁴¹⁸ UN GAOR, 66th Sess., 17th mtg., para. 18 (Working Group Chair), UN Doc. A/C.6/66/SR.17 (Oct. 21, 2011).

⁴¹⁹ UN Doc. A/C.6/71/SR.31, *supra* note 19, para. 26.

the latter type of jurisdiction is not really universal jurisdiction at all, as acknowledged in the Working Group's previous reports.⁴²⁰ As long as some states continue to confuse the relationship between universal jurisdiction and treaty-based jurisdiction, then the inability of the Sixth Committee to agree on how to move the debate forward will persist.⁴²¹

⁴²⁰ *E.g.*, UN Doc. A/C.6/66/SR.17, *supra* note 418; UN GAOR, 67th Sess., 24th mtg., paras. 22-23 (Working Group Chair), UN Doc. A/C.6/67/SR.24 (Nov. 9, 2012).

⁴²¹ *Supra* note 14.